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The best articles published in this Journal in the categories of 'Direct Taxes', 'Company Law and Auditing' and 'Allied Laws and Others' will be awarded the Trophies/ Certificates of Appreciation after being vetted by experts in the profession.

Articles and reading literatures are invited from members as well as from other professional colleagues.

Published By

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Charity ..... begins at home .....

For most of us the word charity means donating money for a good cause. In our busy schedule, we contribute a small portion of our earnings here and there and feel a sense of contentment of having done some good for the Society. But this is not all. Even donating money requires a lot of research and planning. Each and every charitable institution has its own set of purpose and norms of functioning. Firstly, one needs to identify the purpose for which he wants to donate. Secondly, one needs to find out an appropriate organization functioning for the identical cause and purpose. And lastly, one needs to identify as to how he would like to contribute. Mind you, donating money in itself is not the sole purpose of charity. One may contribute by way of time and energy as well. One may even contribute in kind.

According to Vedic scriptures, service to the Society is part of *'dharma'* of one's being. From times immemorial, the well placed Individuals have been contributing their might for the well being of the poor and downtrodden. In today's context, charity has assumed new-found importance as each and every individual is running short of time in his day to day life. It has become very difficult to spare time to look after the well being of one's family members, forget outsiders. We need to spare time out of our busy schedule and allocate resources for the betterment of the Society at large.

For any civilization to prosper, a fair and equitable allocation of resources amongst its citizens is necessary. Despite efforts from the authorities (Government), disparities in such allocation are bound to remain. Charity from well placed individuals and organizations tries to bridge this gap, to an extent. In more developed countries, the private sector plays a role parallel to the administration towards this end. There are examples of billionaires like Bill Gates and Warren Buffet contributing almost 2/3rd of their wealth to charity. This is done in a most systematic and organized manner and the resources are allocated globally for various causes like elimination of poverty and hunger, spread of quality education, providing fresh drinking water, elimination of dreaded diseases like Aids, so on and so forth. As far as India is concerned, exemplary work is being done by the Tata Group and individuals like Messrs. N. R. Narayanmurthy, Nandan Nilenkani, Azim Premji, *et al.*

In the recent past, private sector participation in charity has been corporatized by the newly enacted Company Law. Under the new Companies Act, 2013 a whole set of rules have been framed under "Corporate Social Responsibility" whereby corporates are duti-bound to spend a part of their earnings for social causes. It's a welcome move which shall bring about all round development of the Society and provide equal opportunities to the poor and needy. Most of the resources available shall hopefully be allocated to tackle issues that haunt Indian Society i.e. population control, elimination of poverty, availability of basic education to one and all, provision of fresh drinking water, providing vocational training, establishing and running sophisticated medical facilities, establishing and running basic civil amenities like drainage and sewerage systems, drinking water pipelines, etc.

As the title suggests, charity begins at home. Let us all take a vow to contribute our might in terms of money and time, for the betterment of the Society at large.

શબ્દો વિનાના દર્દની ભાગીદારીમાં માનું છું,
યાદ કરાવવામાં નહિં, યાદ આવવામાં માનું છું,
મોતી નહિં, કોઈ આંખનું આસું થવામાં માનું છું,
સુર્યકિરણ ન પહોંચે ત્યાં દિપક થવામાં માનું છું.

Editorial

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The Ungraceful Audit

Section 44AB in the Income Tax Act has been around since about last 30 years stipulating audit of assessees whose turnover or gross receipts exceed the prescribed limits. Over the period of three decades various issues have emerged in the process, many of which are settled, and many are still being evolved and debated with the ever changing law and the changing business environment. Despite the law being there since such a long time and also various guidance notes published by the Institute of Chartered Accountants of India, the basic questions like whether a particular item forms part of the turnover or not is still a matter of discussion. Without doubt, the provisions of section 44AB are in the interest of the profession providing ample professional opportunity to chartered accountants, the idea behind bringing in such a provision of a more relevance.

The tax audit is to facilitate the Income Tax Department with the information of large assessees which would be helpful while framing their assessments. To put it simply, it is the requirement of the department to extract information of such assessees but as it lacks with the infrastructure and the machinery to meet such requirement, the responsibility is cast upon the profession of chartered accountancy. It is the chartered accountants that are trusted by the Government and allowed to undertake tax audits which otherwise could be done by the department itself.

The important point to be considered is that the audit is done on behalf of the government, of a client, to gather information for which the professional fee is borne by the client. In a given scenario, even though the audit is carried out diligently, the emotions go with the client as he is the one who pays for the job. Is it possible to maintain integrity and independence while conducting the audit where on one hand the department wants us to provide the information and clients have their own expectations against the professional fees paid?

The reporting formats of tax audits have undergone a change w.e.f. 25-7-2014 and the new forms have been made effective with immediate effect without any prior intimation to chartered accountants or the assessees. The sudden change has caused a great hardship to all practicing chartered accountants. There are instances where audits have already been completed before 25-7-2014 but the reports are not uploaded on the website of the department. After 25-7-2014, the utility to upload the tax audit reports in old format has been withdrawn by the department. As of today there is no clear and easy solution as to how to upload these completed reports despite the department's clarification asking for all reports after 25-7-2014 to be furnished in the revised format. Whether an auditor can revise the reports once issued and more so when these reports have already been submitted to various stake holders including banks.

At this juncture, the entire process of tax audits has come to a standstill as the department has not been able to provide the new utility to upload the tax audit reports. The experience from the department as far as providing the platform to file income tax returns after the end of the financial year is not very good and if the department continues to function in the manner it has been over the last few years, it is going to be a tough task ahead for all chartered accountants to complete their tax audit assignments before the due date.

The better option would have been that the CBDT would have come with draft forms and waited for the suggestions from the professional bodies including the Institute of Chartered Accountants of India and only after addressing the concerns of professional bodies and assessees, the department should have made the new forms mandatory. It is not yet too late to make new forms optional for the current assessment year and bring it from the next year which would bring some grace to the audit which otherwise has proved to be so ungraceful over these years.

Namaste,
CA. Ashok Kataria

From the President

CA. Shailesh C. Shah
sckshah@yahoo.com

Dear Esteemed Reader,

A spectacular election campaign, the promise of dramatic change-growth-reform, a thumping victory with the biggest mandate for a single political party in three decades and then the diplomatic coup of his swearing in ceremony—all these had combined to raise expectations from the new government. We could even say that people had begun to expect that Narendra Modi as prime minister (PM) would be nothing short of Amitabh Bachhan or Rajnikant on screen!

The Finance Minister presented his maiden budget in the parliament on 10-07-2014. With his opening words, 'people of India have decisively voted for a change and that the poll verdict was a sign of their exasperation with the status quo', the Finance Minister has tried to touch upon each and every segment so as to ensure that no one remains unpleased.

A number of reforms have been proposed including liberalization of foreign direct investment in defense and insurance upto 49%, a pass-through regime for real estate and infrastructure investment trusts, some certainty for foreign institutional investors (FIIs) and foreign portfolio investors (FPIs), boost to debt markets, and a clear commitment towards a stable and predictable tax system. However clarification on some of the items like general anti-avoidance rules (GAAR) has not been made. Hopefully these will be addressed in Budget 2015.

After looking to the budget it seems that the "bitter pill" referred to by Prime Minister in his earlier speech didn't mean higher taxes. But it means that people would be asked to pay more for utilities. Unless users pay, utilities can't survive.

It is argued that it is copy and paste of the interim budget. However, it is unfair to judge a Budget that had to be prepared in 45 days, especially when there were burning issues of poor monsoon and increase in crude oil prices.

We can say that it was a 'thanksgiving' Budget for voters who gave the BJP a clear majority in the Loksabha election.

The biggest threat to this year's monsoon seems to have moved away, as most of the parts of India have received good amount of rainfall. This could be the reason for cheer in India as India's economy heavily depends on monsoon.

At the Association, the program on Technical Aspects of the Finance Bill – 2014 by Shri Saurabh Soparkar was held jointly with Ahmedabad Branch of WIRC of ICAI which was very well received by all the members. Like every year, budget booklet covering important amendments relating to Income tax and Service tax was also released. I am pleased to inform you that around 12000 copies of the booklet in Gujarati and English were sold. When this issue will reach you we all will be busy in finalizing the tax audit work. Friends, new tax audit report notified by the Department has created hardship for the chartered Accountants. Many members have already prepared the tax audit report pending uploading on the website of the Department. We at the Association have made a strong representation to postpone the applicability of the new tax audit report for one year. Alternatively, we have also suggested that additional time of at least one month be granted for uploading the tax audit report in the old format in cases where audits are completed and report issued prior to 25-7-2014.

Before I conclude I wish all of you happy festive season and happy audit season.

With regards,
CA. Shailesh C. Shah
President

The Right to Information Act, 2005 - Filing of Appeal

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Please refer to my article published in **Ahmedabad Chartered Accountants Journal** (July, 2013) dealing with the citizens' right to access the information held by the public authority and procedure to file RTI application for seeking the information from Public Authority. In this article, attempt has been made to deal with the situations when citizen has been denied the access to information, he may file Appeal/Complaint before the Central Information Commission (CIC).

First Appeal

If a citizen does not receive the information within the period of 30 days of filing of RTI application or is aggrieved by the decision of the PIO, he can prefer an appeal. [S. 19(1)]

In any appeal proceedings, the onus to prove that a denial of a request was justified shall be on the PIO who denied the request. [S. 19(5)]

Appeal should be filed within a period of 30 days from the date on which the limit of 30 days of supply of information is expired or from the date on which the information or decision of the PIO is received.

The belated appeal can be admitted if the appellate authority is satisfied that appellant was prevented by sufficient cause from filing the appeal in time.

Fees Payable

No fees is payable for the filing of appeal under the RTI Act.

How to locate the name and address of the first appellate authority

Generally, Officer who is senior in rank to the PIO is the First Appellate Authority (FAA), in each Public Authority. However, it is the duty of the PIO to mention the particulars such as name, designation and address of the FAA in the order passed by him while disposing of the request for information.

Format of First Appeal

No standard form of first appeal is mandated in Central RTI Rules. However, the appeal should contain following basic particulars:

- Name and address of the appellant;
- Name and address of the Public Information Officer against the decision of whom the appeal is preferred;
- Particulars of the order including number if any, against which the appeal is preferred;
- Brief facts leading to the appeal;
- If the appeal is preferred against deemed refusal, particulars of the application, including number and date and name and address of the Central Public Information Officer to whom the application is made;
- Prayer or relief sought;
- Grounds for prayer or relief;
- Verification and Sign of appeal by citizen himself.

The appeal shall be accompanied by the following documents, self attested by the appellant himself:

- Copy of request seeking the information;
- Copy of order passed by the CPIO against which the appeal is preferred;
- Copy of communication or application or relevant document based on which appellant seeks the information.

Suggested format of first appeal is appended hereto. **[See Exhibit-I]**

Authorized Representative

Appellant may be present in person or through his duly authorized representative. Appellant can authorize a CA or an Advocate or any other person to represent him in the course of hearing before the

appellate authority by way of power of attorney that specifically provides for delegation of power with respect to RTI matters.

Online Filing of First Appeal

First appeal can also be filed on RTI online portal i.e. www.rtionline.gov.in by selecting the option "submit first appeal". Nodal officer will transmit the first appeal to the concerned appellate authority either electronically or physically. However, this online facility is available only in respect of some of the Ministries and Central Government Departments. Supporting documents to be uploaded with the online RTI appeal should be in the PDF format up to 1MB size.

Time Limit for Disposal of First Appeal

The FAA shall dispose of the appeal within a period of 30 days of receipt of the appeal or within such extended period not exceeding a total of 45 days from the date of filing thereof. [S. 19(6)]

Decision on First Appeal

The FAA is conducting quasi judicial proceedings and required to record reasons in writing for arriving at the decision. The FAA may order directing the PIO to provide the information or reject the appeal and refuse to give the information.

Second Appeal to Commission

Any person aggrieved by the order passed by the FAA or by non disposal of his appeal by the FAA within the prescribed time of 90 days from the date on which the decision was given or the time limit prescribed for disposal of first appeal has expired, may prefer a second appeal before the Central Information Commission. [S. 19(3)]

However, Information Commission may condone the delay if it is satisfied that appellant was prevented by sufficient cause from filing the appeal in time.

Format and Documents to be annexed

Format of second appeal is given in appendix to the Right to Information Rules, 2012. **[See Exhibit-II]**

The appeal shall be accompanied by the following documents duly authenticated and verified by the appellant: [Rule 8 & 10]

- Copy of the application submitted to the CPIO;
- Copy of the reply received, if any, from the CPIO;
- Copy the appeal made to the FAA;
- Copy the order received if any, from the FAA;
- Copies of other documents relied upon by the appellant and referred to in his appeal ; and
- Index of the documents referred to in the appeal.
- Proof of identity of appellant as per order dated 02.11.12 of the Punjab & Haryana High Court in CWP No. 4787/2011 – **Fruit Merchant Union v/s. CIC**

Check list for filing second appeal is also available on the home page of website of Central Information Commission i.e. www.cic.gov.in Address of CIC for submission of Second Appeal: August Kranti Bhavan, Bhikaji Cama Place, New Delhi - 110 066 & Old JNU Campus, New Delhi - 110 067. Phone: 26161137 Fax: 26186536

If the appeal is not accompanied by the documents as specified above, it may be returned to the appellant for removing the deficiencies. No appeal shall be dismissed on the ground that it has not been made in the prescribed format if it is accompanied by the aforesaid documents.

Process of Appeal

If the commission is satisfied that it is a fit case to proceed with, it may consider the appeal if it satisfied that appellant has availed of all the remedies available to him under the Act. Otherwise, it may, after giving an opportunity of being heard to the appellant and after recording reasons, dismiss the appeal. Appellant shall be deemed to have availed of all the remedies available to him under the Act if:

- he had filed an appeal before the FAA and it had made a final order on the appeal; or
- no final order has been made by the FAA with regard to the appeal preferred and a period of 45 days from the date of filing of appeal has elapsed.

Fees Payable

No fees is payable for filing of appeal before Central information Commission.

Hearing of Appeal

The appellant shall be informed of the date of the hearing at least 7 clear days before the date of hearing. The Commission has resolved that if the appeal/complaint is received from senior citizen or differently abled person or which involves larger public interest, will be accorded priority in hearing.

Authorised Representative

The appellant may be present in person or through his duly authorized representative or through video conferencing, if the facility of video conferencing is available, at the time hearing of the appeal by the Commission. The Public Authority may authorize any representative or any of the officers of public authority to present its case.

Time Limit for disposal of Second Appeal

The time limit for deciding first appeal is prescribed 30 days. But no such time limit is set for second appeal before Central Information Commission.

RTI activists have demanded that the Commission may be directed to provide decisions in respect of appeals or complaints duly registered, within 3 months from the date of filing or any other timeframe the authorities deem fit, to avoid the adoption of arbitrary practice in listing and processing of appeals.

Decision on Appeal

The Commission, while deciding an appeal, may -

- receive oral or written evidence on oath or an affidavit from the concerned person;
- peruse or inspect the public documents/records;
- inquiry further details/facts through authorized officer;
- hear the CPIO or FAA or third party or such other person against whom appeal lies.

Order of Commission

The order of the Commission shall be in writing and issued under the seal of the commission duly authenticated by the Registrar or any other officer authorized by the Commission for this purpose.

Overriding effect of RTI

The provisions of RTI Act shall have the effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. [S. 22]

Bar on Jurisdiction of Court

No court shall entertain any suit, application or other proceeding in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal under his Act. [S. 23]

Writ Petition before Hon. Courts

In following situations, writ petitions may lie before Hon. High Court or Supreme Court:

- If the order of commission is found to be perverse i.e. unreasonable, unacceptable or contrary to the law; or
- When all the efforts of the citizen fail and he/she is unable to get the desired information.

Online Filing of Second Appeal

- Second appeal can also be filed online on the website of CIC i.e. www.cic.gov.in by selecting the link "CIC online - Submit Second Appeal".
- The supporting document file type allowed for upload need to be in PDF, JPG or GIF format.
- Maximum file size allowed for upload is 2MB.
- Once the form is saved as draft a unique appeal id is provided which can be used in the future for editing the form before final submission.
- Details of second appeal shall not be taken up for hearing; if copy of the RTI request and first appeal is not submitted along with the second appeal
- Information Commission has also launched helpline number- (011) 61117666. By dialling this number, appellant can get the status of the receipt by name, by diary number or by diary year and complaint or appeal file number etc.

Appeal before State Information Commission

The State Governments are empowered to make the rules regarding cost, fee payable, procedure to be adopted by the State Information Commission in deciding the appeals. [S. 27]

Gujarat Government has made the separate rules i.e. Gujarat Right to Information Rules, 2005. Accordingly, First appeal is to be filed in Form-G. **[See Exhibit - III]**

No format of second appeal to State information Commission has been prescribed.

E-appeal can be filed on the website of Gujarat State Information Commission i.e. gic.gujarat.gov.in

Filing of complaint before information commission

It is duty of Central Information Commission (CIC) or State Information Commission (SIC) to receive and inquire into the complaint received from any person on following grounds: [S. 18]

- If an applicant is unable to submit request to PIO by the reason that no such officer has been appointed by authority.
- If PIO refuses to accept his/her application.
- If he has been refused to access any information under this Act.
- If his RTI application for information not responded or he has been denied to access the information within the time limit specified.
- If he has been required to pay fees which is considered unreasonable.
- If he has been given incomplete, misleading or false information.
- Non compliance of any order or directions of the Commission

The CIC and SIC are vested with the powers of Civil Court while inquiring into the matter under this section.

Complaint can also be filed online on the website of CIC i.e. www.cic.gov.in by selecting the link "CIC online - Submit Complaint". Check list for filing complaint is available on the home page of website of Central Information Commission.

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Exhibit - I

Suggested Format of First Appeal
Appeal under Right to Information Act, 2005

Appeal to the _____
(Designation of the Appellate Authority)

1. Name and address of the appellant
2. Name and address of CPIO passing order appealed against
3. Details of information sought for
4. Period to which information relates
5. No. and date of service of order
6. Section under which CPIO passed the order
7. Statement of facts
8. Grounds of Appeal

_____

Signature (appellant)
Tel. No……

Form of Verification

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Place:
Date:

_____

Signature (appellant)

Exhibit - II

Format of Appeal to Commission

Appeal to Hon. Central Information Commission, New Delhi

(See Rule 8)

1. Name and address of the appellant
2. Name and address of CPIO to whom the application was addressed
3. Name and address of CPIO who gave reply to the application
4. Name and address of the First Appellate Authority who decided the First Appeal
5. Particulars of the Application
6. Particulars of the order(s) including, if any, against which the appeal is preferred
7. Brief facts leading to the appeal
8. Prayer or relief sought
9. Grounds for the prayer or relief
10. Any other information relevant to the appeal

_____

Signature (appellant)

Verification by Appellant

I, _____, the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

_____

Signature (appellant)

Place : Tel. No……

Date:

Exhibit - III

GUJARAT RIGHT TO INFORMATION RULES, 2005
FORM G
FORM OF FIRST APPEAL
[See Rule 6(1)]

I.D. No……

Date :……..
(For office use)

To
The Appellate Authority
(Department/office)……..

Sir,

As I have not received any decision/As I am aggrieved by the decision of the public Information Officer ……I, hereby file this appeal.
The particulars of my application are under:-

1. Name of the Appellant :
2. Address of Appellant :
3. (A) Name of the Public Information Officer :
   Address of Public Information Officer:
   (B) Department/Office and address:
   (C) Particulars of the decision against which the appeal is preferred including the No. & Date of such decision.
4. Date of application submitted in the Form A :
5. Details of Information:
   (1) Information asked for
   (2) Period for which information is sought
6. Date as on completion of 30 days after submitting application in Form A.
7. Reasons for Appeal –
   (A) No decision is received within 30 days of submission of application in Form A
   (B) Aggrieved by the decision of Public Information officer Dated :
8. Ground for appeal. Brief facts of the case.
9. Last date for filing the appeal :
10. Prayer/reliefs sought for :

I hereby state that the information and particulars given above are true to the best of my knowledge and belief.

Name of appellant

Date :
Place :

Signature of appellant
Telephone No. : (Office):_____
(Resi.):_____
(Mob.):_____

❊❊❊

Glimpses of Supreme Court Rulings

Advocate Samir N. Divatia
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16 Reputation, Right to:

Reputation is fundamentally a glorious amalgam and unification of virtues which makes a man feel proud of his ancestry and satisfies him to bequeath it as a part of inheritance on posterity. It is a nobility in itself for which a conscientious man would never barter it with all the tea of China or for that matter all the pearls of the sea. The said virtue has both horizontal and vertical qualities. When reputation is hurt, a man is half-dead. It is an honour which deserves to be equally preserved by the downtrodden and the privileged. The aroma of reputation is an excellence which cannot be allowed to be sullied with the passage of time. The memory of nobility no one would like to lose; none would conceive of it being atrophied. It is dear to life and on some occasion it is dearer than life. And that is why it has become an inseparable facet of Article 21 of the Constitution. No one would like to have his reputation dented. One would like to perceive it as an honour rather than popularity.

[Om prakash Chautala vs. Kanwar Bhan and others (2014) 5 SCC 417]

17 Judicial Process:

Held, decision-making process expects Judge to apply restraint, ostracise perceptual subjectivity, make one's emotions subservient to one's reasoning and think dispassionately – He is expected to be guided by established norms of judicial process and decorum – A judgment may have rhetorics but said rhetoric has to be dressed with reason and must be in accord with legal principles, or else mere rhetoric in judgment may cause prejudice to person and courts must refrain from making any kind of prejudicial remarks against a person, especially when he is not party before it – Judge should remember that humility and respect temperance and chastity of thought are at bedrock of apposite expression – Judge should abandon his passion and constantly remind himself that he has singular master 'duty to truth' and such truth should be arrived at within legal parameters.

[Om prakash Chautala vs. Kanwar Bhan and others (2014) 5 SCC 417]

18 Retracted confession under section 15, TATA:

Retraction does not always dilute or reduce or wipe out the evidentiary value of a confessional statement. Quite often retraction is an afterthought. It could be the result of legal advice or pressure exerted by those whose involvement may be likely to be disclosed or confirmed by the confessional statement of the accused. Therefore, in each case, the court will have to examine whether the confession was voluntary and true and whether the retraction was an afterthought. In *Kalawati vs. State of H.P. (AIR 1953 SC 131),* this court stated that the amount of credibility to be attached to a retracted confession would depend upon the facts and circumstances of each case. Again in *State of T.N. vs Kutty,* this Court stated that a retracted confession may form legal basis for conviction if the court is satisfied that the confession was true and was voluntary made. Following these judgment in *Yakub Abdul Razak Memon,* this Court held that where the original confession was truthful and voluntary, the Court can rely upon such confession to convict the accused in spite of a subsequent retraction and its denial in statement u/s 313 CrPC. The law is thus crystallized. A retracted confessional statement is therefore not always worthless.

[Periyasami, s/o Duraisami Novanagar vs. State represented through the inspector or police, 'Q' branch CID, Tiruchirappalli, Tamil Nadu (2014) 6 SCC 59]

19 Doctrine of res judicata:

A decision rendered by a competent Court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so there would be confusion and chaos and the finality of proceedings would cease to have any meaning. Thus, the principle of finality of litigation is based on a sound firm principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end to litigation. The doctrine of res judicata has been evolved to prevent such an anarchy. In a country governed by the rule of law, finality of judgment is absolutely imperative and great sanctity is attached to the finality of the judgment and it is not permissible for the parties to reopen the concluded judgments of the court as it would not only tantamount to merely an abuse of the process of the court but would have far-reaching adverse effect on the administration of justice. It would also nullify the doctrine of stare decisis, a well-established valuable principle of precedent which cannot be departed from unless there are compelling circumstances to do so. The judgments of the court and particularly the Apex Court of a country cannot and should not be unsettled lightly.

Precedent keeps the law predictable and the law declared by the Supreme Court, being the law of the land, is binding on all courts/tribunals and authorities in India in view of Article 141 of the Constitution. The judicial system 'only works if someone is allowed to have the last word' and the last word so spoken is accepted and religiously followed. The doctrine of stare decisis promotes a certainty and consistency in judicial decisions and this helps in the development of the law. Besides providing guidelines for individuals as to what would be the consequences if they choose a legal action, the doctrine promotes confidence of the people in the system of the judicial administration. Even otherwise it is an imperative necessity to avoid uncertainty, confusion. Judicial propriety and decorum demand that the law laid down by the highest court of the land must be given effect to.

[Union of India and others vs. Major S. P. Sharma and others (2014) 6 SCC 351]

20 Doctrine of stare decisis:

Finality of judgments – Role of – Sanctity attached to finality of judgments of Supreme Court – Certainty in law – Cardinal importance of – Reopening concluded judgments of the court tantamount not merely to an abuse of the process of the court but would have far-reaching adverse effect on the administration of justice – It also nullifies doctrine of stare decisis, a well-established valuable principle of precedent which cannot be departed from unless there are compelling circumstances to do so.

[Union of India and others vs. Major S. P. Sharma and others (2014) 6 SCC 351]

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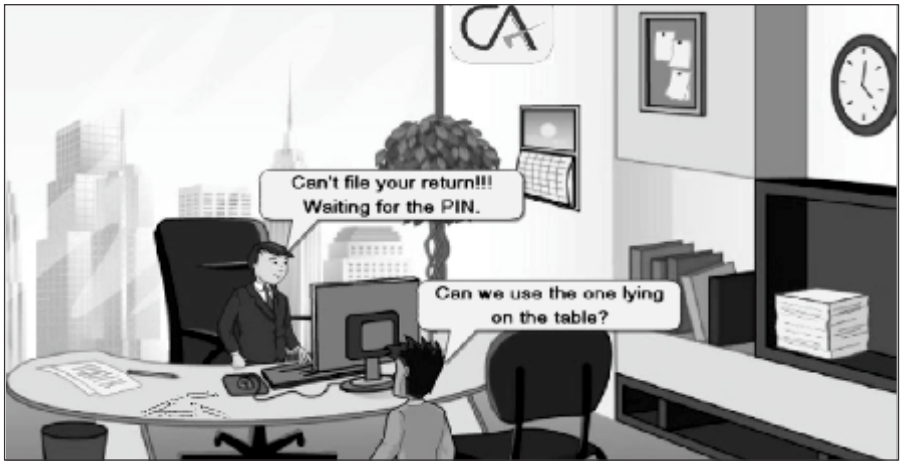

From the Courts

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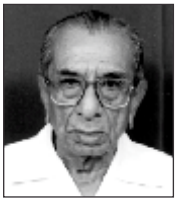

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29 Appeal Filed before wrong officer - Procedure to be followed :

Radha Vinyl P. Ltd. v/s. CIT (2014) 364 ITR 199 (AP)

Issue

What is the procedure to be followed by the Department on filing of appeal before a wrong officer?

Held

It could not be said that there was no appeal pending before the Department in as much as there was no categorical denial of the fact that the assessee filed the appeal before the Department though the appeal had been addressed to the Deputy Commissioner (Appeals). There was no dispute that the appeal was filed as far back as on July, 14, 1993, and for one reason or the other the appeal was not disposed off. Even if it was assumed that the appeal filed by the assessee was addressed to a wrong officer nothing prevented the Department from intimating him to return the papers to enable the assessee to file the appeal before the appropriate authority or in the alternative making over the appeal papers to the competent authority in the hierarchy. The exercise having not been done by the Department and the assessee having never been informed of its appeal not being accepted on the technical ground that the appeal was addressed to the Deputy Commissioner (Appeals), it was not open for the Department to turn round and say that the appeal was not filed before the Competent Authority. Therefore, there was no lapse on the part of the assessee in filing the declaration and the authorities ought to have considered the declaration by the assessee under the Kar Vivad Sanadhan Scheme, 1998, introduced by the Finance (No. 2) Act, 1998 on merits.

30 Reference to DVO without rejection of books invalid :

CIT v/s. Chohan Resorts (2013) 359 ITR 394 (P & H)

Issue

When assessee maintains books of account of construction, whether reference to DVO is valid without rejection of books ?

Held

Wherever the books of account are maintained with respect to the construction, the matter can be referred to District Valuation Officer after the books of account are rejected by the Revenue on some legal or justified basis. In the absence of the rejection of books of account, the reference to the District Valuation Officer cannot be upheld.

High Court took support of Supreme Court decision in the case viz. Surgam Cinema v/s. CIT (2010) 328 ITR 513 (SC) and held that :

"Respectfully following the judgment of the Hon. Supreme Court we hold that no addition can be made on the basis of the report of the DVO without the books of account being rejected wherein every expenditure relating to the construction is recorded and those books of account have not been rejected by the A.O. u/s 145 of the Act, consequently, we delete the impugned addition and direct the A.O. to accept the returned income".

Also See :

Nirpal Singh v/s. CIT

(2013) 359 ITR 398 (P & H)

Note :

The law is proposed to be amended by The Finance (No.2) Bill, 2014, to provide that reference to DVO can be made without rejection of books of account.

31 Mention by Advocate : Dismissal of Appeal :

Bharat Petroleum Corporation Ltd. v/s. I.T.A.T. (2013) 359 ITR 371 (Bom)

Issue

What are the duties of ITAT in the case of mention being made by an Advocate and when the assessee /advocate of assessee is not present on the date of hearing?

Held

The ultimate object of the Tribunal is to decide a dispute between the Revenue and the assessee in accordance with law to ensure that justice is done. In the course of ensuring that justice is done, the Tribunal cannot as a matter of practice bar any advocates or representatives from mentioning the matters before the Tribunal. The mentions of matters should be allowed by the Tribunal. It is of course in the Tribunal's discretion to allow the request made by the parties while mentioning but prohibiting mentioning of matters before the Tribunal is a likely recipe for injustice.

When the assessee is not present before the Tribunal when the appeal is called out for hearing, the Tribunal could either adjourn the hearing of the appeal in its inherent jurisdiction or in terms of rule 24 of the Income Tax (Appellate Tribunal) Rules, 1963, dispose of the appeal on its merits after hearing the respondent. In terms of Rule 24 of the 1963 Rules, the option of dismissing an appeal for default is not available to the Tribunal. Thus, it is not open to the Tribunal to exercise its inherent powers to dismiss the appeal for default as the mandate of section 254(1) of the Act is to dispose of the appeal on its merits even in the absence of the assessee.

Dismissal of an appeal for non prosecution in the face of Rule 24 of the 1963 Rules is an error apparent on the face of the record leading to an irregular order which can be rectified u/s 254 (2).

32 Applicability of provisions of Sec. 40A(2)

CIT v/s. Rajnish Ahuja (2017) 219 Taxman 85 (P & H) (Mag)

Issue

Whether provisions of Section 40(A)(2) can be applied when there is no expense claimed?

Held

When assessee had charged less sale price to sister concerns, provisions of Sec. 40A could not be invoked as no payment had been made to sister concern for any item of expenditure which assessee might have claimed as revenue expenditure.

33 Requirement for Registration of Trust u/s 12AA :

CIT v/s. Jankiji Education Society (2013) 219 Taxman 69 (P & H) (Mag)

Issue

What is the requirement for Registration u/s 12AA of I.T. Act ?

Held

Assessee was declined registration u/s 12AA on ground that funds were surplus and were not utilized for charitable purpose. Tribunal reversed order relying upon an earlier decision where in it was held that object of Section 12AA is to examine genuineness of objects of trust, but not application of income of trust for charitable or religious purposes. High Court held that assessee was rightly allowed registration under Sec. 12AA.

34 Interpretation Principles : Reasonable Construction :

CIT v/s. Textool Co. Ltd. (2013) 263 CTR 257 (SC)

Issue

Fiscal Statute is to be construed strictly. Still application of reasonable construction is applicable?

Held

Assesee company had to make contribution to approved gratuity fund. Company made direct payment to LIC which was disallowed by AO. On appeal it is held that :-

contd. on page no. 280

Tribunal News

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25 OIP Sensor System India Liasion Office vs. ADIT 148 ITD 324 (Del.) Assessment year: 2007-08 Order Dated: 20th December, 2013

Basic Facts

The assessee, liaison office of a foreign company, filed its return on 18-10-2007. The notice under section 143(2) had been served upon the assessee on 1-10-2008, which was beyond the prescribed time limit. The assessee claimed that said notice was invalid and void. The Assessing Officer, however, rejected this objection on ground that 'service of notice by post' had nowhere been defined in the Act, and as such, according to section 27 of the General Clauses Act, 1897 notice was properly addressed and sent by speed post. He completed assessment accordingly. On appeal, the assessee submitted that assessment was barred by limitation.

Issue

Whether date. of service of notice is date of its actual receipt by assessee?

Held

The proviso to section 143(2)(ii) was amended by the Finance Act, 2008, w.e.f. 1-4-2008, to provide that notice under section 143(3) needs to be issued within six months from the end of the Financial Year in which the return is filed. This governing provisions regarding the limitation are procedural provisions and, hence, retrospective in nature, a position also recognized by the CBDT while issuing Circular No. 1 of 2009, dated 27-3-2009, which is binding on the taxing authorities. In view of this, ITAT held that since the return in this case was filed on 18-10-2007, the limitation for service of notice under section 143(2), in accordance with the applicable proviso to section 143(2)(ii), would be six months from the end of the financial year in which the return is furnished. The notice under section 143(2) having been issued on 30-9-2008, is, clearly, beyond the limitation prescribed.

The authorities below have taken the date of issuance of notice, i.e., 30-9-2008 as the deemed date of service, seeking to invoke the provisions of section 27 of the General Clauses Act. The assessee, on the other hand, maintains that since the notice was served on 1-10-2008 it is this date which is the date of service of notice. The contention of the assessee was accepted by the Tribunal and it held that the authorities below have erred in taking the date of issuance of the notice under section 143(2), i.e., 30-9-2008 as the deemed date of the service of such notice on the assessee. The date of service of notice is the date of its actual receipt by the assessee, i.e., 1-10-2008 Accordingly, all proceedings pursuant to such notice are held to be illegal.

26 Sudhir Menon HUF v. ACIT 148 ITD 260 (Mum) Assessment Year:2010-11 Order dated: 12th March, 2014

Basic Facts

The assessee was holding 4.98 per cent share capital of company 'D'. The assessee was offered additional shares at the face value of Rs. 100 each, on a proportionate basis along with other shareholders. The assessee subscribed to and was accordingly allotted on the same terms, not only the shares similarly offered to them but also that not subscribed to by the other shareholders. As the book value of the shares of company 'D' as on 31-3-2009 was Rs. 1,538 per share, which was to be adopted as a measure of their fair market value (FMV) under the applicable rules (Rule 11U and rule 11UA), the Assessing Officer (A.O.), treating the difference of Rs. 1,438 per share as the extent of the inadequate consideration, i.e., in terms of section 56(2)(vii)(c) towards the acquisition of additional shares, brought the same to tax. The Commissioner (Appeals) confirmed said addition.

Issue

Whether right issue of shares to shareholders of a company at a price lesser than FMV can be considered as income chargeable to tax in hands of shareholders under section 56(2)(vii) of the Act.

Held

Applicability of Section 56(2)(vii) of the Act to fresh issue of shares by way of right or bonus

The shareholders get the right to acquire the additional shares on the passing of the board resolution, but the receipt of the property is only on their allotment, on which date the shares, a specified property, is in existence.

That allotment is generally neither more nor less than the acceptance by the company of the offer to take shares. All it means is appropriation out of the previously un-appropriated capital of a company of a certain number of shares to a particular person. Till such allotment the shares do not exist as such, and in a sense come into existence on their allotment

Thus the right to subscribe to shares is a property specified under Section 56(2)(vii) of the Act and there is no basis to state that on the date of receipt of the right to subscribe to shares, specified property i.e. shares were non-existent.

Though the shareholders get the right to acquire fresh shares on passing of board resolution, the receipt of property is only on their allotment on which date a specified property (i.e. shares) come into existence.

Section 56(2)(vii) of the Act seeks to substitute FMV as the normative basis for transactions involving receipt of property, the inadequacy of consideration as compared to FMV being chargeable as income in hands of the recipient of property.

In case of issue of fresh shares, such situation would arise where controlling interest in a company is increased at consideration far below the FMV of the shares or underlying assets. Only a pro-rata allotment or adequately priced issue would effectively ensure an exchange of interest or assets at their par values.

In case of issue of bonus shares, since receipt of bonus shares would be merely a split of the existing shares and there would not be an enhancement in the wealth or property or shareholding of the shareholder over and above its existing holding, the provisions of Section 56(2)(vii) of the Act should not be applicable.

The treatment in case of bonus shares should equally apply to a right issue as far as no disproportionate allotment is made by the company. In absence of his interest getting enhanced in the company/ underlying assets, there would be no question of any property being received by the shareholder on the said allotment.

In such scenario, there will be merely an apportionment of the value of their existing holding over a large number of shares as in case of bonus shares. However where disproportionate allotment is done resulting an increase in the interest of a shareholder in the company / underlying assets, the same would be covered within the provisions of Section 56(2)(vii) of the Act.

Issue of fresh shares at a price lower than FMV would give rise to income in the hands of the shareholder to the extent shares are allotted to such a shareholder in excess of his existing shareholding and thus its receipt cannot be said to be in lieu of or as recompense of his existing property.

Whether 'transfer' is sine qua non for applying provisions of Section 56(2)(vii) of the Act

'Transfer' is not the mode of acquisition to which Section 56(2)(vii) of the Act applies even though it may be a relevant consideration for income in nature of capital gains under Section 45 of the Act. Accordingly, the arguments of the taxpayer that the said provision is not applicable in absence of a 'transfer' and the issuer company not being the owner of the shares is not tenable. The argument of 'receipt' being a synonym for 'transfer' is inconsistent both in context of the intent of the provision as well as its clear language. 'Receipt' is a wide term and would include acquisition by modes other than by way of transfer also.

In the given facts, since there was a reduction in the shareholder's interest in the company post subscription of fresh shares at a price lower than FMV, the difference between the FMV and the issue price could not be assessed as income in the hands of the taxpayer.

27 POSCO Engineering and Construction Co. Ltd. vs. ADIT International Taxation 148 ITD 527 Assessment Year: 2008-09 Order Dated: 26th February, 2014

Basic Facts

The assessee was a non-resident company incorporated in and also Tax resident of Korea. It was mainly engaged in Engineering and construction for Iron, energy and public works etc. It entered into an agreement as a consortium consisting of the assessee (as its leader) and another partner, NCC on one hand and SAIL on the other, for setting up a blast Furnace Complex. The assessee did not offer to tax advance received from SAIL for offshore supply of equipment's, fee for technical services, design and engineering, foreign supervision charges (onshore services) and onshore supply of equipment's for which activities were completed outside India without any involvement of Indian office. Further the advance was remitted outside India and title in goods was transferred at High Sea. The AO held that the assessee had a fixed place PE/ Supervisory PE/Services PE in terms of article 5 of the DTAA and was also having business connection in India in terms of section 9(1)(i). The accordingly brought to tax the 5 per cent of mobilization charges received in respect of offshore supply of equipment as business income as per article 7 of the DTAA and also section 9(1)(i). The 5 per cent of mobilization charges received in respect of design and engineering, the AO initially held it to be royalty as per section 9(1)(vi) and then also as 'Fees for Technical Services' as per section 9(1)(vii). However, while computing the total income, he included 90 percent of this amount as attributable to the PE by applying profit margin of 30.65 percent. The DRP set aside the objections raised by assessee.

Issue

Whether in case of a composite income, which is partly relatable to operations, carried out in India and partly to outside India, a proportionate part of income which is so relatable to operations carried out in India as per section 9(1), has to be charged to tax in terms of article 7 of India-Korea DTAA?

Held

It can be seen that the position under the DTAA is almost analogous to the position as stipulated by Explanation (1)(a) to section 9(1)(i). Crux of both the provisions is that only that part of the business income of the non-resident can be charged to tax in India, which is attributable to operations carried out in India due to business operations as per section 9(1) or is attributable to the PE as per Article 7 of the DTAA. Thus, it is vivid that the principle of apportionment of income with reference to the territorial nexus is not only explicit but also forms an integral part of both section 9(1) read with Explanation (1)(a) as well as Article 7 of the DTAA. If a particular income is not attributable to the operations carried out in India and thus has no territorial nexus with India, then a non-resident cannot be charged to tax for that income. Per contra, if a particular income is attributable to the operations carried out in India and thus has territorial nexus with India, then there can be no escape from charge of such income to tax. In case of a composite income, which is partly relatable to the operations carried out in India and partly to outside India, a proportionate part of income which is so relatable to the operations carried out in India, has to be charged to tax. Therefore, it can be concluded that, the income for which everything is done in India is fully taxable but the principle of apportionment applies to tax that part of the composite income which is relatable to operations carried out in India, leaving aside that part of income which is not so. Applying the above principle, it is palpable that that the second component of the sale in India, is chargeable to tax in India.

The Tribunal held that the amount received for Design & Drawings would be taxable in India since it is not part of the equipment's supplied outside India, it deals with every aspect of the erection and commissioning of the plant right from foundation of buildings and roads till the completion of the entire project. All such drawings are customized. The tribunal held that payment could not be termed as royalty since the drawings and designs were customized for a particular project which are not capable of use for any other purpose. The amount were held to be fees for technical services since the drawings & Designs customized to the assessee's requirements are result of the rendering of technical services. On the basis of the new explanation below section 9(2) inserted by Finance Act 2010 with retrospective effect from 1/6/1976, it was held that the fees for Design & Drawings would be taxable in India even though nonresident has not rendered services in India and since the drawings& designs were to be used for business carried out in India.

28 Nanubhai D. Desai vs. ACIT 162 TTJ 673 (Ahd)(SB) Order Dated: 23rd May, 2014

Basic Facts

The Special Bench had been reconstituted as per the directions of Hon'ble Gujarat High Court in appeal titled as Deepak R Shah V ITAT since the Special Bench constituted earlier had not pronounced any order. The question referred to the Special Bench was "whether Shri Deepak R. Shah, advocate and Ex-AM of the Tribunal is debarred from practicing before the Tribunal in view of the insertion of r.13E in the ITAT Members (Recruitment and Conditions of Services) Rule, 1963?. In the beginning of the hearing itself the Bench has placed following question.

Issue

Whether Tribunal has the inherent jurisdiction to decide question as to whether an Ex-member of Tribunal can appear and practice before Income Tax Tribunal Benches?

Held

The legal position is that the High Court of judicature at Allahabad, Lucknow Bench, in the case of Dinesh Chandra Agarwal V Union of India(Service Bench No.62 of 2012) vide an order dt. 19th January 2012 has held that the judgment rendered in the case of Concept Creations V Add. CIT (2009) 125 TTJ(DEL)(SB) 433 was beyond its pale of tax appeals as contained in the IT Act vide Ss.253 and 254 thereof. Hence the view taken by the Special Bench in the Concept Creations about the competence of the Tribunal Benches to hear service related issues, including Special Bench, now stood reversed. Moreover as on date, there is no other decision of any other High Court. The Tribunal Bench as also the Special Bench are subordinate to the High Courts. In the hierarchical judicial system an accepted rule to follow a precedent is that, "the better wisdom of the Court below has to yield to higher wisdom of the Court above. Once an authority higher than the Tribunal has expressed an opinion on some issue, then the Tribunal is no longer at liberty to rely upon its earlier decision, may be a decision of the Special Bench". This is a settled rule hence even a non-jurisdictional High Court order do not alter the position and therefore to be followed, if not dissented. Hence, the Tribunal being a subordinate Court, is expected to follow in letter and spirit an order of the Hon'ble High Court, unless and until either reversed by the Hon'ble Apex Court or by an order of the Jurisdictional High Court taking a contradictory view. Hence, the decision of the Special Bench pronounced in the case of Concept Creations is no more a good law on this issue being reversed by the Hon'ble Allahabad High Court. So the present legal position is that the Tribunal has no inherent jurisdiction to decide the question as to whether an Ex-Member of the Tribunal can appear and practice before the Income Tax Tribunal Benches.

Note: The Account member (minority view) has expressed dissenting view holding that since the Special Bench was reconstituted by the President as per directions of jurisdictional High Court dt.11th Feb 2014 which has been passed after interim order dt.19th Jan 2012 of the Allahabad High Court the special bench of the tribunal is duty bound to decide the referred question as no material was brought on record that the aforesaid direction of the Jurisdictional High Court was varied subsequently by the Gujarat High Court or the Supreme Court.

29 Panasonic Industrial Asia Pte Ltd.. vs. DDIT 162 TTJ 475(Del) Assessment Year: 2009-10 Order dated: 31st January, 2014

Basic Facts

The assessee was a company incorporated in Singapore and was operating in India through a branch office. During the relevant assessment year the assessee entered into international transactions relating to provision of support services and reimbursement of expenses. In the course of transfer pricing proceedings, the assessee submitted a list of comparable including one ICC agencies. Subsequently, the assessee sought exclusion of ICC agencies from list of comparable contending that due to State Policy adopted by the State Government, said comparable managed to earn super normal profits during relevant period. The TPO as well as the DRP refused to accept the assessee's plea.

Issue

Whether can a assessee be barred from pleading for exclusion of a comparable even if the said entity was included in the comparables by the assessee itself.

Held

The assessee has pleaded that the operation of the policy of the State of Gujarat in the immediately preceding assessment year which had focused on large scale distribution of sewing machines materially affected the profits of the very same comparable and these conditions operated in the year under consideration also. The position that the comparable ICC agencies is a functional comparable was proposed by the assessee during the proceedings before the TPO which it now seeks to exclude on the ground that the said comparable, though functionally similar, has in the year under consideration shown extraordinary profits due to the impact of the Government policy. The Hon'ble ITAT held that in the afore-mentioned facts, it is opined that the data available in the public domain leading to the conclusion that ICC Agencies was operating in unique circumstances during the period under consideration prima facie requires to be considered and verified and cannot be out rightly rejected taking a specious plea that the comparable was proposed by the assessee itself. The assessee cannot be barred from pleading for the exclusion of a comparable when it pleads the existence of extraordinary circumstances. The existence of such a fact would make a specific period creating extraordinary circumstances in the case of a functional comparable an incomparable. The argument that since it was proposed by the assessee as such should not be excluded solely on this ground has no merit. To hold so would be not in compatibility with the scheme as the very purpose of having Appellate Forums would be defeated if it is held that once a functional comparable is offered by a party where on facts it could not have been a comparable then for all times to come the said party de horse the material on record would be barred from pleading for its exclusion. Accordingly the issue was restored back to the TPO with directions to consider the arguments for excluding the said comparable after allowing the assessee to lay evidence in support of its claim.

30 Jhonson & Jhonson Ltd. V ACIT 148 ITD 129 (Mum).
Assessment Year 2002-03; Order dated 28th August 2013.

Basic Facts

The assessee had entered into international transactions with its AE. It had paid royalty for the use of brands and trademarks as per the terms of the brand usage agreement and also paid royalty for the technical/marketing knowhow provided to the assessee as per the terms of the Knowhow agreement entered into between assessee & AE. The assesee adopted the Transactional Net Margin Method (TNMM) for determining the arm's length price of its international transactions. The TPO observed that assessee was not getting any fresh technology per se from AE and restricted the technical knowhow royalty to 1% on manufactured goods and further disallowed (a) tax paid by assessee on payment of brand name royalty (b) royalty on sale of traded finished goods and (c) corresponding tax and research and development cess. On appeal CIT(A) confirmed the disallowance of tax paid by assesse on payment of brand name royalty whereas deleted the other disallowance made by the TPO.

Issue

Whether payments of royalty made to AE as per agreement approved by RBI were allowable expenditure.

Held

The application made by the assessee to RBI for brand usage agreement specifically mentioned that the royalty to be remitted is net of taxes. Further the approval was received from the RBI to remit the royalty on brand usage by the assessee net of taxes. Considering the brand usage agreement vis –a vis the approval granted by RBI, it can be safely inferred that the taxes were liability of the assessee under the agreement. The agreement between assessee and AE for payment of royalty has to be considered in the light of the approval of the RBI. There is no substance in the findings of the TPO that there is no need for paying royalty for technical/ marketing knowhow. There is also no force in the findings of the TPO that this royalty is deemed to be included in the brand royalty. In view of the findings that the royalty payment has been approved by RBI, the tribunal allowed tax and research and development cess & Technical know-how royalty.

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Unreported Judgements

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Whether an assessee can get refund of the TDS made from the income earned by him even when the same is not deposited by the deductor is an issue which we come across many a times in our routine practice. Recently, Hon'ble Gujarat High Court in the case of Sumit Devendra Rajani decided this issue in favour of the assessee, the gist of which is given in this issue. We hope readers would find it useful.

In the High Court of Gujarat at Ahmedabad

Special Civil Application No. 2349 of 2014

Sumit Devendra Rajani…… Petitioner(s)
Versus
Asstt. Commissioner of Income Tax – OSD - …… Respondent(s)

Appearance:
Mr. Ketan H. Shah, Advocate for the Petitioner(s) No.1
Mrs. Mauna M. Bhatt, Advocate for the Respondent(s) No.1

Coram : Honourable Mr. Justice M.R. Shah
and
Honourable Mr. Justice K.J. Thaker

Date : 23/06/2014

CAV Judgment

(Per : Honourable Mr. Justice M.R. Shah)

Gist only

Facts :

The petitioner being an individual and assessed to tax filed his return of income for A.Y. 2010-11 showing a total income of Rs.29,54,982/- and claimed the credit of TDS of Rs.5,86,606/-. The petitioner individual was in receipt of this amount from his employer M/s Amar Remedies Limited from whom he was receiving both salary as well as consultation fees for which necessary TDS was made and relevant Form No. 16 &16A as applicable were issued. In the Form No. 26AS downloaded from the departmental site only partial credit was appearing in favour of the petitioner though in the two TDS certificates of Form No. 16 & 16A issued by M/s Amar Remedies Limited, the entire amount of TDS was shown to be have been paid to Government.

The department, since it did not find full credit in Form No. 26AS, did not give credit to the petitioner for full amount and raised demand u/s 221(1) of the Act, which was challenged by the petitioner by way of Writ Petition in the Gujarat High Court.

Contentions of petitioner before Gujarat High Court:

i) The impugned demand / recovery notice without giving any credit of TDS, which is shown to have been made by the deductor is illegal and arbitrary.

ii) M/s Amar Remedies Limited has shown TDS of Rs.5,86,606/- in Form No. 16 & 16A to the payee and hence to that extent payee has received less amount.

iii) As per the provisions of Section 205 of the Act even in a case where deductor may not have deposited the amount of TDS, where tax is deductible under Chapter-XVII, assessee shall not be called upon to pay the tax himself to the extent to which TDS is made from the income. In such case, the department is required to recover amount from the deductor and no such recovery can be made from the assessee.

iv) The petitioner also relied on following decisions:

a) Gauhati High Court in the case of ACIT v/s Om PrakasGattani - 242 ITR 638

b) Bombay High Court in the case of YashpalSahni v/s ACIT - 293 ITR 539

c) Director of Income Tax (International Taxation) v/s NGC Network Asia Lic - 313 ITR 187 (Bom)

d) Anusuya Alva v/s DCIT - 278 ITR 206 (Karnataka)

e) CIT v/s Ranoli Investment P. Ltd. – 235 ITR 433 (Guj.)

Decision of the Hon'ble High Court

After considering the contentions of both the parties, the Hon'ble High Court following the decisions of Gauhati High Court in the case of Om PrakasGattaniand Bombay High Court in the case of YashpalSahni referred earlier agreed with the views of both the High Courts and held as under :

"We are in complete agreement with the view taken bythe Bombay High Court and Gauhati High Court. Applying the aforesaid two decisions of the Bombay High Court as well as Gauhati High Court, the facts of the case on hand and even considering Section 205 of the Act action of the respondent in not giving the credit of the tax deducted at source for which Form No. 16A have been produced by the assessee – deductee and consequently impugned demand notice issued under Section 221(1) of the Act cannot be sustained. Concerned respondent therefore, is required to be directed to give credit of tax deducted at source to the assessee – deductee of the amount for which From No. 16A have been produced.

In view of the above and for the reasons stated petition succeeds. It is held that the petitioner-assessee – deductee is entitled to credit of the tax deducted at source with respect to amount of TDS for which Form No. 16A issued by the employer – deductor – M/s Amar Remedies Limited has been produced and consequently department is directed to give credit of tax deducted at source to the petitioner – assessee – deductee to the extent Form No. 16A issued by the deductor have been issued. Consequently, the impugned demand notice dated 6/1/2012 (Annexure D) is quashed and set aside. However, it is clarified and observed that if the department is of the opinion deductor has not deposited the said amount of tax deducted at source, it will always open for the department to recover the same from the deductor. Rule is made absolutely to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs."

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contd. from page 273

Real intention behind the provision of Sec. 36(1)(v) is that the employer should not have any control over the funds of the irrevocable trust created exclusively for the benefit of the employees. In the instant case, it is evident from the findings recorded by the CIT(A) and affirmed by the Tribunal that the assessee had absolutely no control over the fund created by the LIC for the benefit of the employees of the assessee and further all the contributions made by the assessee in the said fund ultimately come back to the fund, approved by the CIT, Thus the conditions stipulated in Sec. 36(1)(v) were satisfied and therefore, payment made by the assessee company directly to LIC towards group gratuity fund is deductible u/s 36(1)(v).

Though a fiscal statute is to be constructed strictly, and nothing should be added or subtracted to the language employed in the section, a strict construction of a provision does not rule out the application of the principles of reasonable construction to give effect to the purpose and intention of any particular provision of the Act.

35 Income u/s 115JB : No Penalty u/s 271(1)(c) : CIT v/s. Aleo Manali Hydro (2013) 219 Taxman 90 (All) (Mag)

Issue

When income is assessed under MAT provision u/s 115JB, whether provision of Section 271(1)(c) would be applicable ?

Held

Where deemed income assessed u/s 115JB becomes basis of assessment as it was higher than income determined under normal provisions and thus, concealment would have no role to play and it would be totally irrelevant. Concealment did not lead to tax evasion at all for imposing penalty.

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Controversies

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Whether prosecution u/s 276B of the Income Tax Act, 1961 can be initiated if the TDS is paid late?

Issue:

XYZ Ltd. is a sick company incurring losses since last five years. However, in spite of adverse financial conditions the company paid all the tax deducted at source, but same was paid late. The CIT (TDS) has initiated provisions of Section 276B, of the Income Tax Act, 1961 for prosecution.

Proposition:

It is worthwhile examining the wording of relevant provisions closely. The text is as follows:

276B- Failure to pay tax to the credit of Central Government under chapter XIID or XVIIB.

"If a person fails to pay to the credit of the Central Government,

- the Tax deducted at source by him as required by or under provisions of Chapter XVIIB or
- the tax payable by him , as required by him or under,
- Sub Section(2) of Section 115-O; or
- the second proviso to Section 194B,

he shall be punishable with rigorous imprisonment for a term which shall not be less than 3 months but which may extend to 7 years and with fine."

It is proposed that provision of Section 276B of the Income Tax Act 1961, can be initiated when the amount of the tax deducted at source has been paid, though it is paid late.

View Against Proposition:

Firstly, the very heading suggest that there should be a failure to pay the tax. Secondly the placement of clause (a) in the section, makes it clear that it pertains to the tax deducted as per the provisions of chapter XVIIB and not payment as per provision of chapter XVIIB. Thus, failure to pay is on different footing. Put differently, payment need not be within the time specified in that chapter.

In short, the section contemplates total failure and not mere delay. As against this, even if the tax is already paid with interest, the notices for prosecution are being issued. The notices also mention the fact of prior payment. This, then, is clearly against the wording and spirit of the provision.

It is necessary to compare the text of section 276B with provisions of section 40(a)(ia).S ection 40(a)(ia) contemplates a time limit for the payment of tax as well ; and not merely the deduction as per Chapter XVII B. For mere delay, there are already adequate provisions viz. section 40(a)(ia) disallowance; 201(1A)- interest, 271C and 221 – penalty. Thus, section 276B clearly applies to total failure and not a mere delay.

In case of **BEE GEE MOTORS AND TRACTORS AND ANOTHER vs. INCOME TAX OFFICER Punjab and Haryana High court reported 218 ITR 155** "held that the complaint was that the petitioners did not deduct the income tax at source for the years 1982-83 & 1983-84, thus, making themselves liable for punishment under section 276B of the Act. However, the petitioners later did deduct the required tax on February 20, 1985 and deposited the same on the same date. By the time tax was deducted and deposited, no prosecution had been launched. Since an insignificant amount of Rs. 9428 in one case and an even lesser amount in another case was involved and the prosecution was launched after a number of years after the default was committed or the tax was deposited and the matter was pending since 1993, the complaint deserved to be quashed."

View in favour of the proposition:

The provision of the chapter XVIIB cast duties on assessee to deduct tax at source on various payments made to the deductee. Thus, the deductor is an agent of the government to collect tax. The tax so collected, has to be deposited or paid to the credit of the Central Government and any failure in the payment of tax in time will attract all the consequences of payment of interest and penalty and even prosecution.

The High Court of Bombay , Nagpur Bench in the case of ITO V/S Sultan Enterprises reported in 127 Taxman 514 was held as under :

"The facts of the case are not much in dispute. The offence in question relates to non deposit of tax deducted at source amount within the prescribed time and therefore action was taken against them and dues were recovered by imposing penalty and interest. This also amounts to offence punishable provided under sections 276B and 278B.The learned CJM erred in applying the principle of double jeopardy as provided under section 300 of the code of criminal procedures for the simple reason that the recovery of the amount due and payable by respondent firm to the Income Tax Department has nothing to do with criminal prosecution because it is a distinct provision inviting penal action for the default committed by the firm. They are liable both for the recovery of the amount with interest and penalty so also for prosecution for having committed offence punishable under section 276B of the Act for their failure to pay the amount within the prescribed period and as the respondent firm is a partnership concern all the partners of the firm as contemplated under section 278B would be liable to be prosecuted."

The Central Board of Direct Taxes (CBDT) has recently modified the guidelines for initiation of prosecution under section 276B of the Income Tax Act, 1961 ("Act"). The press release dated August 6, 2013 has clarified that any delay in remittance of Tax Deducted at Source ("TDS"), would be liable for prosecution regardless of the period of delay.

Under Section 276B of the Act, any tax deductor could be prosecuted for delay or default in remittance of TDS and be sentenced with rigorous imprisonment up to a period of 7 years. Prior to this press release, the Revenue Authorities ("RA") were adhering to an internal guideline of initiating prosecution proceedings where the delay was more than 12 months. In other words, a tolerance period of 12 months of delay for initiation of prosecution was followed.

To curb the practice of tax deductors deliberately deducting the remittance of TDS and deploying the funds for business, the CBDT has withdrawn the tolerance period, which was only an internal guideline, not prescribed in law. With this change in policy, the RA could initiate prosecution proceedings even for a day's delay in remittance of taxes. It has also been clarified that tax deductors would have the option of applying for compounding of such offences before the Jurisdictional Chief Commissioner and the offence would be compounded in suitable cases.

Summation:

It is pertinent to note that CBDT had issued instruction number 1335 of CBDT dated 28-5-1980 to the effect that prosecution should not normally be proposed when the amount involved are not substantial and the amount in default has also been deposited to the credit of the government.

It is necessary to compare the text of section 276B with provisions of section 40(a)(ia). Section 40(a)(ia) contemplates a time limit for the payment of tax as well; not merely the deduction as per Chapter XVIIB. For merely delay, there are already adequate provisions viz. Section 40(a)(ia) disallowance; 201(1A)-interest, 271C and 221-penalty. Thus, section 276B clearly applies to total failure and not a mere delay.

The Provisions of Section 278AA lays down that no person shall be punishable for any failure referred to in section 276B if he proves that there was reasonable cause for such failure.

It is essentially a question of fact to be decided in each case on consideration of material placed before the concerned authority. However the burden of proof that there was a reasonable cause for default is on assessee.

In **SEQUOIA CONSTRUCTION CO. LTD. & ORS. Vs. P.P. SURI, INCOME TAX OFFICER** reported in(1985) 47 CTR(DEL) 277: (1986) 158 ITR 496 (DEL) : (1985) 21 TAXMAN 13 **there was delay in deposit of TDS**. In view of reasonable cause shown by assessee, penalty proceedings came to be dropped by both appellate authorities. In this respect the court held that "Dropping of penalty proceedings must weigh with trial Court while judging the reasonable cause prevailing with assessee. Milder proof of reasonable cause must be taken to have been established. Continuance of prosecution proceedings would be a sheer exercise in futility and harassment of assessee – Prosecution was quashed".

In **UNION OF INDIA vs PYARELAL TARACHAND & ANR. (2003) 180 CTR (MP) 551 : (2003) 264 ITR 525 (MP) : (2004) 135 TAXMAN 97** the Hon High Court declined to interfere in the judgment where trial court acquitted the assessee because it was not proved that the assessee has deliberately or intentionally committed the default.

Prosecution cannot be initiated against the company. It has to be initiated in the name of Director or Principal Officer responsible for TDS compliances. For initiating prosecution proceedings against the director of the company, the assessing officer has to give notice u/s 2(35) expressing his intention to treat such directors of a company as "principal officers". However, it would be sufficient compliance if in the show cause notice issued to the company it is mentioned that the directors are to be considered as principal officers of the company.

In absence of both, permission is not granted to appeal against the judgment passed by Addl. Chief Metropolitan Magistrate whereby respondent director of the company has been acquitted of the offence under s. 276B. **(COMMISSIONER OF INCOME TAX vs. DELHI IRON WORKS (P) LTD. & ORS(2011) 331 ITR 5 (DEL) : (2010) 195 TAXMAN 372 (DEL).**

The Supreme Court in ***Madhumilan Syntex Limited vs Union of India*** **(2007) 290 ITR 199 (SC) (2007) 160 Taxman 71 (SC)** held that a delayed payment of tax deducted at source constitutes offence u/s 276B. In that case, the assessee had deposited the TDS amount late. The assessee had contended that since it has paid the amount, though late, it has not committed any default and hence no offence can be registered against it. The Supreme Court dismissed this contention and observed that – " The contention of the appellant that though tax deducted at source has been deposited late but since TDS has already been deposited to the account of the Central Government, there was no default and no prosecution can be ordered, could not be accepted. Once a statute requires to pay tax and stipulates period within which such payment is to be made, the payment must be made within that period. If the payment is not made within that period, there is default and appropriate action can be taken under the Act. Interpretation canvassed by the appellant would make the provision relating to prosecution nugatory."

Keeping in mind the stringent provisions of law, first thing which is required is its strict compliance. Assessee is required to pay interest and penalty for various defaults. There is an urgent need for clear cut guidelines about the amount of tax default and period of default which may attract prosecution. This will not only save time of the assessee and the department but will also save assessee from undue harassment.

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Judicial Analysis

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In case of violation of S.11(5) of the Income Tax Act, only income from such investments loses exemption u/s 11 and not the whole income.

CIT v. Fr. Mullers Charitable Institutions [2014] 44 taxmann.com 275 (Kar)

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11. With regard to second and third substantial questions of law are concerned, reading of Section 13(1)(d) of the Act makes it clear that it is only the income from such investment or deposit which has been made in violation of Section 11(5) of the Act that is liable to be taxed and that violation under Section 13(1)(d) does not tantamount to denial of exemption under Section 11 on the total income of the assessee. An identical question came before the Bombay High Court in the case reported in Sheth Mafatlal Gagalbhai Foundation Trust (supra). The question before the Bombay High Court is "Whether violation of Section 11(5) r/w Section 13(1)(d) by the assessee-Trust attracts maximum marginal rate of tax on the entire income of the Trust? The Bombay High Court held that in case of contravention of Section 13(1)(d), maximum marginal rate of tax under Section 164(2), proviso is applicable only to that part of income of the Trust which has forfeited exemption and not the entire income. Relevant paragraph reads as under:

"Sec. 164(2) refers to the relevant income which is derived from property held under trust wholly for charitable or religious purposes. If such income consists of severable portions, exempt as well as taxable, the portion which is exempt is to be left out and the portion which is not exempt is charged to tax as if it is the income of an AOP. Therefore, a proviso was inserted by the Finance Act, 1984 w.e.f 1st April 1985, under which in cases where the whole or any part of the relevant income is not exempt under s. 11 or s.12 because of the contravention of s.13(1)(d), the tax shall be charged on such income or part thereof, as the case may be, at the maximum marginal rate. In other words, only the non-exempt income portion would fall in the net of tax as if it was the income of an AOP. The phrase 'relevant income or part of the relevant income' in the proviso is required to be read in contradistinction to the phrase 'whole income' under s. 161(1A). This is only by way of comparison. Under s. 161(1A), which begins with a non obstante clause, it is provided that where any income in respect of which a person is liable as a representative assessee consists of profits of business, the tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate. Therefore, reading the above two phrases shows that the legislature has clearly indicated its mind in the proviso to s. 164(2) when it categorically refers to forfeiture of exemption for breach of s.13(1)(d), resulting in levy of maximum marginal rate of tax only to that part of the income which has for forfeited exemption. It does not refer to the entire income being subjected to maximum, marginal rate of tax. This interpretation is also supported by Circular No.387, dt. 6th July, 1984. Vide the said Circular, it has ' been laid down in para 28.6 that where a trust contravenes s.13(1)(d), the maximum marginal rate of Income-tax will apply only to that part of the income which has forfeited exemption wider the said provision and not to the entire income. There is a vital difference between eligibility for exemption and withdrawal of exemption/forfeiture of exemption for contravention of the provisions of law. These two concepts are different. They have different consequences. In the circumstances, there is merit in the contention of the assessee that in the present case the maximum marginal rate of tax

will apply only to the divided income from shares held in contravention of s.13(1)(a) and not to the entire income. Therefore, income other than dividend income shall be taxed at normal rate of taxation under the Act."

A similar view has been taken by the Delhi High Court in a judgment reported in Agrim Charan Foundation (Supra).

Reading of the proviso to Section 142 is very clear that the legislature has clearly contemplated that in a case, where the whole or part of the relevant income is not exempted under Section 11 by virtue of violation of Section 13(1)(d) of the Act, tax shall be levied on the relevant income or a part of the relevant income at the maximum marginal rate. The said analogy is applicable to the facts of the present case.

12. We are in respectful agreement with the views expressed by the Bombay High Court as well as Delhi High Court for violating Section 11(5) of the Act and the entire income of the respondent-Trust cannot be assessed for the tax.

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Director of Income-tax (Exemption) v. Sheth Mafatlal Gagalbhai Foundation Trust [2001] 249 ITR 533 (BOM.)

Kapadia, J. - The short question of law which arises for determination in the above group of appeals is as follows :

"Whether violation of section 11(5) read with section 13(1)(d) by the assessee-trust attracts maximum marginal rate of tax on the entire income of the trust ?"

In these appeals, we are essentially concerned with deciding the scope of section 164(2) read with its proviso as also the effect of contravention of section 11(5) and section 13(1)(d)(iii) of the Income-tax Act, 1961 ('the Act').

Facts

2. The assessee-trust came into existence after 1-6-1973. The assessee-trust was a holder of equity shares of Mafatlal Industries during the assessment year 1994-95. They were the holders of the shares even after 31-3-1993. In this group of appeals, we are only concerned with the effect of the violation of section 13(1)(d). There is no dispute about the contravention. The assessee, during the relevant assessment year, received dividend income from Mafatlal Industries of Rs. 15,103. The assessee also received interest income of Rs. 2,095. These facts are taken from Income-tax Appeal No. 267 of 2000. The facts are common to all other appeals. Hence, by this judgment, the above group of appeals are disposed of as the facts are common in all the above matters. The point of law is also common. According to the Assessing Officer, on account of violation of section 11(5), the department took the stand that the assessee forfeited its exemption under section 11 in respect of its entire income, viz., dividend income plus interest income, whereas, according to the assessee, they were entitled to claim exemption and they were entitled to continuance of exemption in respect of interest income though they had forfeited their right to claim exemption vis-a-vis the dividend income as the assessees continued to hold the shares of non-Government company even after 31-3-1993. Being aggrieved, the assessee carried the matter in appeal to the Commissioner which came to the conclusion that the assessee was not entitled to the benefit of exemption under section 11 in respect of the entire income. Being aggrieved, the assessee carried the matter in appeal to the Tribunal. The Tribunal came to the conclusion that in view of section 164(1), the income receivable by the trust was the relevant income and that a portion of such relevant income only would suffer tax because of the violation of the condition of investment prescribed by section 11(5). The Tribunal found that non-fulfilment of such condition cannot deprive the trust of the exemption of its other income which has been granted to it in the earlier years. Hence, the Tribunal allowed the appeal. It directed that only dividend income in the present case should be taxed at maximum marginal rate and the income, other than the dividend income, viz., interest income be taxed at normal rate of taxation as applicable under the law.

Arguments

3. Mr. Desai, the learned senior counsel appearing on behalf of the department, contended that section 11(5) provides for various forms and modes of investing or depositing the money by the trust. He contended that violation of section 11(5) results in forfeiture of exemption given to the trust. He contended that under section 11(2) of the Act, it is provided that where 70 per cent of the income referred to in clause (a) or clause (b) of section 11(1) is not attracted to charitable or religious purposes in India during the previous year, but is accumulated or set apart either in whole or in part for application to such purposes, then such income so accumu- lated or set apart shall not be included in the total income of the previous year provided certain conditions are satisfied. He contended that violation of section 11(5) results in consequences which are specifically mentioned in section 164(2) which, inter alia, lays down that in the case of relevant income derived from property held under trust, tax shall be charged on so much of the relevant income as is not exempt under section 11 as if the relevant income, not so exempt, was the income of an AOP. In other words, he contended that in view of section 164(2), forfeiture of exemption for breach of section 11(5) would result in imposition of tax at maximum marginal rate as if the assessee was an AOP. He contended that by a deeming fiction the Legislature has provided for an assessee-trust to be assessed as an AOP consequent upon its violation of section 11(5). He, accordingly, contended that the entire income of the trust was liable to be charged to tax under maximum marginal rate and on the basis of such income accruing to an AOP.

4. On the other hand, Mr.Andhyarujina, the learned counsel appearing on behalf of the trust, contended that the requirement of investment in specified securities under section 11(5) results in an income to the trust which is receivable by the trustees and it is called as relevant income under section 164(1). He contended that a portion of such relevant income, in the present case, would suffer tax because the condition of investment, as prescribed under section 11(5), had not been fulfilled, but non-fulfilment of such condition cannot deprive the trust of the exemption of its other income which had been granted in the earlier years. He contended that in this connection the proviso to section 164(2) is very important. He contended that under the said proviso, the Legislature has clearly contemplated that in a case where the whole or part of the relevant income is not exempt under section 11 by virtue of violation of section 13(1)(d), tax shall be charged on the relevant income or a part of the relevant income at the maximum marginal rate. In this connection, he relied upon the Circular issued by the Board bearing No. 387, dated 6-7-1984 which supports his above contention.

Findings

5. For the purposes of this appeal, it would be relevant to quote section 164(2) read with its proviso :

"164(2) In the case of relevant income which is derived from property held under trust wholly for charitable or religious purposes, or which is of the nature referred to in sub-clause (iia) of clause (24) of section 2, or which is of the nature referred to in sub-section (4A) of section 11, tax shall be charged on so much of the relevant income as is not exempt under section 11 or section 12, as if the relevant income not so exempt were the income of an association of persons :

Provided that in a case where the whole or any part of the relevant income is not exempt under section 11 or section 12 by virtue of the provisions contained in clause (c) or clause (d) of sub-section (1) of section 13, tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate."

6. Section 164 does not create a charge on the income of a discretionary trust. The word 'charge' in section 164 means 'levy'. Section 164(2) refers to the relevant income which is derived from property held under trust wholly for charitable or religious purposes. If such income consists of severable portions, exempt as well as taxable, the portion which is exempt is to be left out and the portion which is not exempt is charged to tax as if it is the income of an AOP. Therefore, a proviso was inserted by the Finance Act, 1984 with effect from 1-4-1985 under which in cases where the whole or any part of the relevant income is not exempt under

section 11 or section 12 because of the contravention of section 13(1)(d), the tax shall be charged on such income or part thereof, as the case may be, at the maximum marginal rate. In other words, only the non-exempt income portion would fall in the net of tax as if it was the income of an AOP. Section 11(5) lays down various modes or forms in which a trust is required to deploy its funds. Section 13(1) lays down cases in which section 11 shall not apply. Under section 13(1)(d)(iii), it has been laid down that any share in a company, not being a Government company, held by the trust after 30-11-1983 shall result in forfeiture of exemption. By virtue of the proviso (iia) it has been laid down that any asset which does not form part of permissible investment under section 11(5) shall be disposed of within one year from the end of the previous year in which such asset is acquired or by 31-3-1993, whichever is later. In the present case, the assessee was required to dispose of the shares under the said proviso by 31-3-1993 [See the judgment of this Court in IT Appeal No. 81 of 1999 dated 14-9-2000]. The shares have not been disposed of even during the assessment year in question. Now, under section 164(2), it is, inter alia, laid down that in the case of relevant income which is derived from property held under trust for charitable purposes, which is of the nature referred to in section 11(4A), tax shall be charged on so much of the relevant income as is not exempt under section 11. Section 164(2) was reintroduced by the Direct Tax Laws (Amendment) Act, 1989 with effect from 1-4-1989. Earlier it was omitted by the Direct Tax Laws (Amendment) Act, 1987. However, the Legislature inserted a proviso by the Finance Act, 1984 with effect from 1-4-1985. By the said proviso, it is, inter alia, laid down that where whole or part of the relevant income is not exempt by virtue of section 13(1)(d), tax shall be charged on the relevant income or part of the relevant income at the maximum marginal rate. The phrase 'relevant income or part of the relevant income' is required to be read in contradistinction to the phrase 'whole income' under section 161(1A). This is only by way of comparison. Under section 161(1A), which begins with a non obstante clause, it is provided that where any income in respect of which a person is liable as a representative assessee consists of profits of business, the tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate. Therefore, reading the above two phrases shows that the Legislature has clearly indicated its mind in the proviso to section 164(2) when it categorically refers to forfeiture of exemption for breach of section 13(1)(d), resulting in levy of maximum marginal rate of tax only to that part of the income which has forfeited exemption. It does not refer to the entire income being subjected to maximum marginal rate of tax. This interpretation of ours is also supported by Circular No. 387, dated 6-7-1984. Vide the said Circular, it has been laid down in Para 28.6 that where a trust contravenes section 13(1)(d), the maximum marginal rate of income-tax will apply only to that part of the income which has forfeited exemption under the said provision and not to the entire income. We may also add that in law there is a vital difference between eligibility for exemption and withdrawal of exemption/forfeiture of exemption for contravention of the provisions of law. These two concepts are different. They have different consequences. It is interesting to note that although the Legislature withdrew section 164(2) by the Direct Tax Laws (Amendment) Act, 1987 which provision was reintroduced by the Direct Tax Laws (Amendment) Act 1989, the Legislature did not touch the proviso to section 164(2) which has been on the statute book right from 1-4-1985. The said proviso was inserted by the Finance Act, 1984. The proviso specifically refers to violation of section 13(1)(d) and its consequences. In the circumstances, we find merit in the contention of the assessee that in the present case the maximum marginal rate of tax will apply only to the dividend income from shares in Mafatlal Industries Ltd. and not to the entire income. Therefore, income other than dividend income shall be taxed at normal rate of taxation under the Act.

7. Accordingly, the above question is answered in the negative, i.e., in favour of the assessee and against the department. Question No. 1 is answered in our judgment in IT Appeal No. 81 of 1999.

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FEMA Updates

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21 Guidelines relating to participation of Foreign Portfolio Investors (FPIs) in the Exchange Traded Currency Derivatives (ETCD) market

It has now been decided to allow foreign portfolio investors (FPIs) eligible to invest in securities as laid down in Schedules 2, 5, 7 and 8 of the Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000 (FEMA 20/2000-RB dated May 3, 2000 (GSR 406 (E) dated May 3, 2000)) as amended from time to time to enter into currency futures or exchange traded currency options contracts subject to the terms and conditions.

For Full Text refer to A.P. (DIR Series) Circular No. 148 - http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=8952

22 Remittances to non-residents – Deduction of Tax at Source

The Central Board of Direct Taxes (CBDT) has revised the existing instructions to be followed while allowing remittances to the non-residents, with effect from October 1, 2013. It has issued Income Tax (14th Amendment) Rules, 2013 vide Notification No. S.O 2659(E) dated September 2, 2013 on furnishing of information under Section 195(6) of the Income Tax Act, 1961 and prescribed the rules and forms to this effect.

Reserve Bank of India has reviewed the policy relating to issue of instructions under Foreign Exchange Management Act, 1999 (FEMA), clarifying tax issues. It has now been decided that Reserve Bank of India will not issue any instructions under the FEMA, in this regard.

For full text refer to: A.P. (DIR Series) Circular No. 151 - http://www.rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=8971

23 Financial Commitment (FC) by Indian Party under Overseas Direct

Investments (ODI) – Restoration of Limit

It has been decided to restore the limit of Overseas Direct Investments (ODI)/ Financial Commitment (FC) to be undertaken by an Indian Party under the automatic route to the limit prevailing, as per the extant FEMA provisions, prior to August 14, 2013. It has, however, been decided that any financial commitment exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route.

For full text refer to: A.P. (DIR Series) Circular No.1 - http://www.rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9088

24 Import of Rough, Cut and Polished Diamonds

It is permitted to approve Suppliers' and Buyers' Credit (Trade Credit), including the usance period of Letters of Credit for import of Rough, Cut and Polished Diamonds for a period not exceeding 90 days from the date of shipment.

Taking into account the representations received from the diamond importers and the GJEPC, it has been decided, in consultation with the Government of India, that the Clean Credit i.e. credit given by a foreign supplier to its Indian customer/ buyer, without any Letter of Credit (Suppliers' Credit) / Letter of Undertaking (Buyers' Credit) / Fixed Deposits from any Indian financial institution for import of Rough, Cut and Polished Diamonds, may be permitted for a period not exceeding 180 days from the date of shipment.

For full text refer to: A.P. (DIR Series) Circular No. 2 - http://www.rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9090

25 Issue of Partly Paid Shares and Warrants by Indian Company to Foreign Investors

A review of the policy as regards to partly paid shares and warrants has been undertaken and it has been decided as under apart from other conditions mentioned in the circular:

(i) Eligible instruments and investors

Partly paid equity shares and warrants issued as per applicable law, shall be eligible instruments for the purpose of FDI and FPI by FIIs/RFPIs subject to compliance with FDI and FPI schemes.

(ii) Pricing and receipt of balance consideration

(a) Partly paid equity shares: Pricing of partly paid equity shares shall be determined upfront and 25% of the total consideration amount shall also be received upfront; and balance within 12 months. The time period for receipt of balance consideration within 12 months can be extended in certain cases.

(b) Warrants: The pricing of the warrants and price/ conversion formula shall be determined upfront and 25% of the consideration amount shall also be received upfront and the balance within 18 months. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such warrants, in accordance with the extant FEMA Regulations and pricing guidelines stipulated by RBI from time to time.

(iii) Reporting

(a) Partly paid equity shares: The reporting of receipt of foreign inward remittance towards each upfront /call payment for FDI transaction shall be made in Advance Reporting Form along with supporting documents. The reporting of issue or transfer of partly paid shares shall be made in form FC-GPR and form FC-TRS respectively, to the extent the equity shares are called up.

(b) Warrants: The identity of non-resident investor shall be disclosed for the purpose of compliance with KYC norms at the time of issuance of warrants.

The reporting of receipt of foreign inward remittance towards each upfront /call payment for FDI transaction shall be made in Advance Reporting form along with supporting documents. The reporting of issue or transfer of warrants in form FC-GPR and form FC-TRS respectively, under the head 'others'.

(iv) Compliance

The onus of compliance of all the conditions under FEMA as regards entry route, sectoral caps and all other conditions under FDI guidelines shall be on the Investee company in case of issue of partly paid shares /warrants as well as upon resident transferor or transferee in accordance with extant guidelines in case of transfer of partly-paid shares/warrants. The onus of compliance with individual limit below 10% of the total paid-up equity capital shall be on each FII/RFPI.

For full text refer to: A.P. (DIR Series) Circular No. 3 - http://www.rbi.org.in/scripts/BS_Circular Index Display.aspx?Id=9095

26 Foreign Direct Investment (FDI) in India - Issue/Transfer of Shares or Convertible Debentures

Optionality clauses have been allowed in equity shares and compulsorily and mandatorily convertible preference shares/debentures to be issued to a person resident outside India under the Foreign Direct Investment (FDI) scheme subject to conditions mentioned therein.

The extant pricing guidelines in respect of transfer/ issue of shares and for exit from investment in equity shares with or without optionality clauses of listed/ unlisted Indian companies have since been reviewed so as to provide greater freedom and flexibility to the parties concerned under the FDI framework as under:

contd. on page no. 316

Service Tax Decoded

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Budget Simplified

For the year 2014-15, budgeted revenue from service tax is Rs. 2,15,973/- Crores which shows growth of Rs. 51,046/- Crores compared to revised budget revenue of Rs. 1,64,927/- Crores for the year 2013-14. It is worth noting that year 2013-14 was the first full year of Negative List Regime. Thus there is huge growth of 30.95% is expected from the service tax. This is the highest growth rate in any tax revenue for this budget. This year, it is the first time when tax revenue from service tax has overtaken the revenue from Customs or the revenue from Excise Duty. It is for sure that withdrawal of few exemptions and keeping the same tax rate are not going to fetch additional Rs. 51 thousand cores. Thus, we need to go through the proposals of the Finance (No.2) Bill, 2014 and related notifications carefully. Major changes are discussed in this article.

1. One of the most discussed and far reaching change is increase in the rate of interest for delayed payment of service tax. Rate of interest is increased upto 30% per annum. Rate of interest is linked to the period of delay. Interest @ 18% p.a. is to be paid for delay upto the period of six months, interest @ 24% p.a. is payable for the period beyond six month and upto the delay of one year. Interest @ 30% p.a. is required to be paid for the period beyond one year.
   a. I am not aware about any tax law where interest is payable at rate as high as 30% p.a. So as far as the rate of interest is concerned, now service tax law may be regarded as a worst tax law.
   b. This provision will result in high compliance through timely payment of service tax. Now, no one can afford to pay interest @ 30% p.a.
   c. High rate of interest say @24%/30% is nothing but a penalty named as interest.
   d. Deduction of 3% in interest rate as provided in the proviso to Section 75 is still available where value of taxable services provided, in the preceding financial year is not exceeding Rs. 60 Lakhs.
   e. This amendment ("*Bure Din*") will come in to force ("*Aayenge*") from 01-10-2014. Even, service tax outstanding on that day, for the period one year will be subject to interest @ 30% p.a. from 1-10-2014 for the delay beyond one year.
   f. These rates of interest will affect the assessee who will chose to fight the demand. Generally, at present, show cause notices are being issued for the period covering period of last five years. Once the notice is issued, it takes around one year to two years for adjudication. Thereafter, further one year to one and half year is required for appeal before the Commissioner (Appeals). And, at present, at the Central Excise and Service Tax Appellate Tribunal (CESTAT) it may take 2-3 years for final order. Even if we don't consider the time required in High Courts and Supreme Courts, if appellant lose the case at the CESTAT, appellants may be end up paying interest @ 30% p.a. for 5-7 years which will definitely be more than the service tax liability itself. Now, where questions of interpretation are involved, a taxpayer either has to pay full service tax as pre-deposit or he will be exposed to risk of payment of high interest @ 30% p.a. at end of the litigation. It is exorbitant rate of interest which is nothing but deprive of right to have justice. Now, even if you survive penalties due to involvement of question of interpretation or unintentional non-payments, you still have to pay penalty in

form of interest as cost to choose to have fight with the department.

2. Another important change is in the field of litigation. At present, against the demand confirmed through Order-in-Original, assessee can prefer appeal before the Commissioner (Appeals) or the CESTAT as the case may be. The appellate authority may waive the requirement of pre-deposit in the cases where the appellant has prima facie strong case and pre-deposit may cause undue hardship to the appellant. Section 35F of the Central Excise Act, 1944, which is also made applicable to the service tax is being substituted. w.e.f. the date of enactment of the Finance Act, 2014, it will be compulsory for appellant to pre-deposit 10% of the duty demanded and penalty if order is passed by the Commissioner (Appeals) and appeal is to be filed before the CESTAT. If the first appeal is before Commissioner (Appeals) or before CESTAT, such amount of pre-deposit would be 7.5%.

   a. This amendment has got both positive and negative responses from the society. Although most of the people are not having positive response for such amendment, I feel that this proposal is not worth throwing away. However, certain relaxations are needed to be given in genuine cases for examples; cases where dispute in the matter is already covered by the decision of the High Courts or the Supreme Courts in favour of the assessee; cases where demand is periodical demand and earlier demand has not survived in litigation etc.

   b. More than 80% of the demands, confirmed in the orders don't survive at the CESTAT. It shows that majority of the demands being confirmed by the learned officers are frivolous. It means that this majority of the appellants who are victim of such attitude of the department will also have to suffer a pain of paying pre-deposit of 7.5%/10% as the case may be.

   c. Today around half of the time of the CESTAT is being spent on the hearing stay applications. If the requirement of the pre-deposit is dealt with in the law, this essential time may be utilized in delivering the final judgments on the appeals. This amendment is going to get that essential time saved particularly when number of pending cases at CESTAT has crossed one lakh.

   d. One doubt being raised is that when 7.5% of duty demanded (and penalty if any) is paid as pre-deposit for appeal before the Commissioner (Appeal), whether assessee needs to deposit additional 10% or is it suffice if rest of 2.5% is paid for appeal before the CESTAT. Reading of the provisions of Section 35F of the Central Excise Act, 1944 reveals that it will be suffice if additional 2.5% of the duty demanded (and penalty if any) is paid as pre-deposit at this stage. Some clarification from the Central Board of Excise and Custom (CBEC) is badly needed.

   e. One more doubt is being raised. Pre-deposit of 7.5%/10% is made mandatory with a view to unlock the crores of rupees of revenue locked in the litigation and speed up the delivery of judgment in litigation. One doubt is that even after payment of pre-deposit of 7.5%, is appellant required to file a stay application for recovery of the rest of the demand or not? One school of thought is that once the order is passed, unless stayed or set a side by the higher authority, it is final and recovery of the demand may be initiated and hence to stay operations of such order, application for stay is still required. However, if it is the situation, entire purpose for amendment of mandatory pre-deposit would be defeated. Clarification from the CBEC may throw some light on the situation.

   f. Section 35 reads that 7.5%/10% of "*duty demanded or penalty imposed or both*" is to be paid as pre-deposit. Another doubt being raised is that as the "or" is used, is it proper that if only 7.5%/10% of duty demanded or penalty imposed is paid. In

my opinion, the provision may be read as follows. If only duty is demanded, percentage of duty demanded is to be paid, if only penalty is demanded, percentage of penalty is to be paid and if both are demanded percentage of both is required to be paid.

g. As provided in the first proviso to the Section 35F of Central Excise Act, 1944, amount required to be deposited shall not exceed Rs. 10 crores. This cap is also too high and going to help only high profile assesses.

h. Provisions of the Section 35F will come into force from the date of commencement of the Finance (No.2) Act, 2014. Second proviso to the said section clarifies that the provisions of new section 35F will not be applicable to the appeals and stay application pending on the date of commencement of the Finance (No.2) Act, 2014. It means that payment of mandatory pre-deposit will be required for any appeal filed on or after the date on which the Finance (No.2) Bill, 2014 receives assent of the President.

i. In terms of old provisions of Section 35F "duty demanded" would include interest also. However, in terms of explanation to proposed Section 35 "duty demanded" don't include the interest and hence, pre-deposit of 7.5%/10% of the interest amount is not required.

j. Pre-deposit will be mandatory as it is embedded in the provision of the Central Excise Act, 1944. The CESTAT, being a creature of the provisions of the Customs Act, 1962 (made applicable to Central Excise Act, 1944 and Finance Act, 1994), can't go beyond the provisions of the Central Excise Act, 1944 or the Finance Act, 1994. Meaning thereby, the CESTAT can't waive the pre-deposit by the appellant which is made mandatory through the provisions of the Central Excise Act, 1994. However, High Courts may waive off the requirement of the pre deposit in interest of justice.

3. Another important change is in the CENVAT Credit Rules, 2004. At present there is no time limit for taking CENVAT Credit and the same may be taken even after 3-4 years as held by the various courts and tribunals. However, now Rule 4(1) and Rule 4(7) of the CENVAT Credit Rules, 2004 are being amended to provide that CENVAT Credit is to be taken within six months from the date of issue of invoice or other documents as specified in the Rule 9(1) of the said rules.

   a. This amendment is a very harsh. It takes away legitimate right of the service providers. Now, it will not be possible to take CENVAT credit if such a credit is missed due to oversight and came to the knowledge after six months.

   b. This limitation is apply only to the "input" and "input services" and not to the "capital goods" and hence CENVAT credit for "capital goods" as defined in the rules may be taken even after the period of six months.

   c. CENVAT credit for the service tax paid under reverse charge mechanism may be taken based on the challan through which service provider has paid the service tax. It is also an eligible document under Rule 9(1) for taking CENVAT Credit. Hence, CENVAT credit for service tax paid under full reverse charge mechanism may be taken within six months from the date of such challan.

   d. This amendment is coming into force from 1st September, 2014. Hence, the assessee may find out the CENVAT credit missed and take the same on or before 31st August, 2014 even if invoices are issued or challans are paid prior the six months, subject to other conditions.

   e. It is worth noting that the restriction is imposed on taking of the CENVAT credit. Once, the CENVAT credit is taken within the time limit, there is no time limit for utilization of the said credit.

f. CENVAT credit may be taken immediately on receipt of invoice. But if payment to service provider/manufacturer is not made within the period of three months from the date of payment, assessee is required to pay amount equivalent to the CENVAT credit on such invoice and on payment to service provider/manufacture, assessee becomes entitled to take that CENVAT credit back [New third proviso to Rule 4(7)]. However, such a entitlement is subject to other provisions of the CENVAT Credit Rules, 2004 and as per this new provisions, CENVAT credit may not be available if payment to service provider/manufacturer has been delayed for six months or above.

g. Most of the time demand of service tax is being confirmed after six months. Or even assessee may come to know only after six months that service tax is payable on certain services. In such a case generally, CENVAT credit is being allowed on input and input services which are used by the service provider for providing that services and only net service tax payable may be demanded. However, now, by the time the demands get confirmed, assessee's right to claim credit may have been gone and department may dispute the eligibility of the CENVAT and demand the full service tax liability without allowing the CENVAT credit for input services/inputs used for such services.

4. Under Entry No. 9 of the mega exemption Notification No. 25/2012-ST, service provided to an educational institution by way of renting of immovable property was exempt from the tax. This entry is amended to withdraw this exemption and now schools and colleges will have to pay service tax to service providers in addition to rent for premise. Further, blanket exemption was provided to services provided to an educational institution for the services which an educational institute carry out themselves but may obtain as outsourced from other person. Scope of this exemption is now restricted to transportation, catering, security, housekeeping and admission & examination related services. Even after 67 years of the independence, the Government is failed in providing education to all the citizens. In such a situation it is not at all a welcome change. w.e.f. 11-7-2014, "*Bure Din Aa Gaye*".

5. In the case of Goods Transportation Agency (GTA) Services, abatement of 75% is available if CENVAT credit for inputs, input services and capital goods in not taken. In the case of GTA, generally, service recipient is liable to pay service tax and it is difficult for him to prove that service provider has not taken the CENVAT Credit and for that service recipient was required to obtain certificate from each and every GTA service provider to that effect. This is an age old issue which was settled earlier through inserting suitable provision in prevailing abatement notification but the same provision was missing in the new abatement Notification No. 26/2012-ST came into existence with Negative List Regime. Due to this, that old age issue of obtaining certificates from GTA was reemerged. Now, it is settled once again and obtaining certificate from GTA is not required (w.e.f.11-7-2014).

6. At present, transportation of passengers by a contract carriage, whether airconditioned or not, is exempt under Entry No. 23 (b) of the mega exemption Notification No. 25/2012-ST. Now, exemption for airconditioned contract carriage has been withdrawn w.e.f. 11-07-2014. Definition of the Contract Carriage is borrowed from the Motor Vehicle Act, 1988. In terms of Section 2(7) of the said Act, a contract carriage is a motor vehicle which carries a passenger or passengers for hire or reward and is engaged under a contract, whether expressed or implied, for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person which a holder of a permit in relation to such vehicle or any person authorized by him in this behalf **on a fixed or an agreed rate** of sum on a time basis, whether or not with reference to any route or distance; or from one point to another, and in either case,

without stopping to pick up or set down passengers not included in the contract anywhere **during the journey**, and includes a maxicab and a motor cab. In simple words, private air conditioned buses will have to pay service tax w.e.f. 11-7-2014.

7. Loading, unloading, packing, storage, warehousing and transportation (except by air) of cotton (ginned or bailed) is made exempt w.e.f. 11-7-2014.

8. Selling of space or time slots for advertisements (other than advertisements broadcast by radio or television) is a service in the Negative List in terms of Section 65D(g). This entry is being amended w.e.f. date to be notified after enactment of the Finance (No.2) Act, 2014. This exclusion is being restricted to selling of space for advertisement in print media and all other selling of space and time slots will be taxable. Following points should be noted in this regards.

   a. Under Entry No. 55 of the LIST II- STATE LIST of the Constitution of India, taxes on advertisements other than advertisements published in the newspapers and advertisement broadcast by radio or television is subject matter of the State and hence Central Government is not empowered to tax thereon. In the year 2001, Hon'ble Madras High Court has upheld the constitutional validity of service tax on services provided by advertising agency in relation to advertisement in the case of Advertising Club V. CBEC [2006 (2) STR 457 (Mad.)]. However, now the entry is differently worded and it seems that it steps into the exclusive power of the State and hence constitutional validity of this proposed entry may be challenged in the High Court.

   b. Selling of space for advertisement in print media is still not subject to service tax. Print media is defined to be books and news papers as defined in the Press and Registration of Books Act, 1867.

      - In terms of the Section 1(1) of the said Act, book includes every volume, part or division of a volume, and pamphlet, in any language, and every sheet of music, map chart or plan separately printed.
      - In terms of the Section 1(1) of the same Act, newspaper means any printed periodical work containing public news or comments on public news.

   c. Definition of "book" as given in the above stated Act is an inclusive definition. We need to refer to meaning of the books in general parlance and law settled under the said act. Black's Law Dictionary (4th Edition) defines the books as an assembly or concourse of ideas expressed in words. It is also defined as a literary composition which is printed; a printed composition bound in a volume. Whether any material is book or not will be question of facts and area is prone to litigation.

   d. In terms of the proposed Section 65B(39a) of the Finance Act, 1994, Business Directories, Yellow Pages and Trade Catalogues which are primarily meant for commercial purpose is not to be considered as print media and hence selling of space for advertisement in such Business Directories, Yellow Pages and Trade Catalogues will be made taxable.

   e. Examples for coverage for new levy as given in D.O.F No. 334/15/2014-TRU dated 10-7-2014 are advertisements on internet websites, out-of-home media, on film screen in theatres, bill boards, conveyances, buildings, cell phones, Automated Teller Machines, tickets, commercial publications, aerial advertising, etc.

9. Service of transportation of passengers by Radio Taxis is service in the Negative List in terms of Section 65D(o). This exclusion is being removed w.e.f. the date to be notified after enactment of the Finance (No.2) Act,

2014 and service of transportation of passengers by Radio Taxies would be taxable.

a. In terms of Paragraph 2(za) of the Notification No. 25/2012-ST as amended by Notification No. 6/2014-ST, "radio taxi" means a taxi including a radio cab, by whatever name called, which is in two-way radio communication with a central control office and is enabled for tracking using Global Positioning System (GPS) or General Packet Radio Service (GPRS).

b. Abatement of 60% will be provided to such services.

10. Scope of Reverse Charge Mechanism (RCM) has been expanded or amended as follows.

a. Banking company, financial institution and non-banking financial companies are made liable to pay service tax on services received from a recovery agent. 100% of the tax is to be discharged by the service recipients. (w.e.f. 11-7-2014)

b. Similarly, service provided by the director of a body corporate, even if it is not a "company" is brought under the Reverse Charge Mechanism. For examples, Co-operative Banks are having directors but they may be registered under Multi-State Co-operative Societies Act, 2002 or other Acts and not as a "Company". Now, reveres charge is also made applicable to such cases. 100% of the tax is to be discharged by the service recipients. (w.e.f. 11-7-2014)

c. In the case of renting of motor vehicle designed to carry passengers, if services are covered under RCM and if value is not abated (i.e. CENVAT credit is taken), 40% of the tax liability is to be discharged by the service recipient and 60% by the service provider. Now, w.e.f. 1-10-2014, service recipient will have to pay 50% and service provider will have to pay 50% of the total tax payable.

11. At present, payment of service tax shall be made electronically through internet banking if total service tax paid is Rs. 1 Lakh or more (including utilization of CENVAT Credit) in the preceding financial year. W.e.f. 1-10-2014, every assessee is bound to pay service tax electronically through internet banking.

a. Method for making payment is procedural law and law as stands on the date of compliance will be applicable. Payment of service tax for the month of September, 2014 is required to be discharged on or before 6th October, 2014 and hence will be required to be made electronically only.

b. This amendment will affect small tax payers, particularly who are liable to pay service tax under reverse charge mechanism only.

c. It is worth noting that if the payment is not made electronically, penalty of Rs. 10,000/- may be imposed under section 77(1)(d) of the Finance Act, 1994.

d. Jurisdictional Assistant Commissioner/ Deputy Commissioner may for reasons to be recorded in writing, allow assessee to deposit the service tax by any mode other than internet banking.

12. At present in the case of renting of a motor vehicle abatement of 60% in the value is not available if CENVAT credit is taken. In the case of Motor Cabs, where sub-contracting is involved, it is not possible for the sub-contractors/main contractor to take CENVAT credit and pass on the same if they want to take abatement. This issue is now addressed after long representations since introduction of Negative List in the year 2012.

a. This amendment will come into force only on 1-10-2014 and not before that.

b. CENVAT credit of Inputs and Capital goods is still not available.

c. Input services of renting of motor cab will be allowed as follows. If person from whom service is received is paying service tax on 40% of the value, full CENVAT credit will be allowed. If person from whom service is received is paying service tax on

full value, CENVAT credit upto 40% will be allowed.

d. Input services other than renting of motor cab will still not be allowed.

13. W.e.f. 1-10-2014 Rule 2A of the Service Tax (Determination of Value) Rules, 2006 is being amended and in the case of works contracts for maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property, 70% of value of such works contract will be subject to service tax instead of 60% at present.

14. In terms of Rule 7 of the Point of Taxation Rules, 2011, point of taxation in the case of Reverse Charge Mechanism (RCM) is the date on which payment is made to the service provider. In terms of present first proviso to Rule 7 of the Point of Taxation Rules, 2011, if the payment is not made to the service provider within period of six months from the date of invoice, point of taxation pre-ponds to date of invoice and liability is required to be discharged along with interest on completion of six months. Now, w.e.f. 1-10-2014, the said proviso is being substituted to effect that if payment is not made within three months from the date of invoice, point of taxation shall be the date immediately following the said period of three months.

    a. It means that now:

        - first, limit of six month is reduced to three mounts; and
        - secondly, point of taxation will not pre-pond to date of invoice and hence undue interest liability will not be there.

    b. Further, transitional provision is made to effect that for invoices issued before 1-10-2014, if the payment is made within six months from the date of invoice, that date will be the point of taxation otherwise, point of taxation will pre-pond to invoice date.

15. Place of provision for intermediary services is the location of the service provider [Rule 9(c)) of the Place of Provision of Services Rules, 2012]. If the intermediary is located in taxable territory, service tax is to be levied and if the intermediary is located in non-taxable territory, service tax is not applicable. At present intermediary means a broker, agent or any other person who arranges or facilitates a provision of service and broker, agents etc. dealing in goods are not intermediary and place of provision in their services is generally being determined based on the location of the service recipient and not based on the location of the service provided. Now, w.e.f 1-10-2014, commission agents, brokers etc. dealing in goods will be considered as "intermediary" and hence place of provision will be determined based on their location.

    a. For example, suppose an importer of goods has paid commission to a commission agent located in a non-taxable territory then at present their place of provision is place of provision of service recipient, i.e. importer, i.e. in the taxable territory and service tax is to be paid by the service recipient under reverse charge mechanism. However, w.e.f. 1-10-2014, place of provision will be location of service provider, i.e. in non-taxable territory and hence service tax will not be applicable thereon.

    b. Same way, commission agents located in taxable territory and receiving commission from the foreign suppliers/buyer in convertible foreign exchange will have to pay service tax as the place of the provision of services will be in taxable territory.

    c. Thus, situation may totally be reversed once this amendment will come into effect. Any person paying or receiving commission for goods in cross border transactions is required to revisit their taxation for service tax.

16. Facility for advance ruling is now made available to the private limited companies w.e.f. 11-7-2014. Now, a private limited company can also seek for an advance ruling for the determination of a question of law or fact regarding the liability to pay service tax in

relation to a service proposed to be provided by the private limited company.

17. In terms of present explanation to Section 67A of the Finance Act, 1994, rate of exchange is rate of exchange referred to in the Explanation to Section 14 of the Customs Act, 1962. Thus, to make payment under Reverse Charge Mechanism, one need to refer to the rates notified under the Customs Act, 1962 which is being changed frequently and hence hard to be followed by the tax payer.
    a. It is proposed that particular rules under service tax law itself will be prescribed for determination of rate of exchange and dependency on the Customs Act, 1962 will not be there.
    b. This amendment will come into force from the date to be notified by the Central Government and till date no rules is prescribed for this.
18. Up to 10-7-2014, CENVAT credit of service tax paid under reverse charge mechanism is available only if payment of the service is paid to service provider and service tax is also paid by the service recipient. Payment to service provider for value of service was really undue requirement.
    a. W.e.f. 11-7-2014, CENVAT credit for service tax paid under full reverse charge will be available irrespective of the fact that payment for service to service provider has been made or not.
    b. However, for the services covered under partial reverse charge, this requirement is still to be complied with.
19. Once the Show Cause Notice is issued, there is no time limit for the determination of service tax due at present and Adjudication Officers generally takes one year to two year to adjudicate the Show Cause Notices generally. Now, sub section (4B) is being inserted in Section 73 (w.e.f. the date of enactment of the Finance (No. 2) Act, 2014) and it is being provided that the Central Excise Officer shall determine the amount of service tax due within six months from the date of notice.
    a. This time limit is not made a compulsion but has to be followed where it is possible to do so. So the God knows how much effective this provision will be.
    b. This limit will be of one year when extended period of limitation is invoked under the proviso to Section 73(1) or the proviso to Section 73(4A). Department hardly issues Show Cause Notice without invoking extended period of limitation i.e. without charge of fraud, collusion etc. and hence for most of the notices this limit will of one year only.
20. At present search and seizer may be authorized by the Joint Commissioner. Now, it is proposed to give such a power to Joint Commissioner/ Additional Commissioner or any other officer as notified by the CBEC. W.e.f. date of enactment of the Finance (No.2) Act, 2014, CBEC will be empowered to notify even a Superintendent who can authorize a search or seizure.
21. Section 87 is proposed to be amended to effect that service tax due from the predecessor of the business at time of transfer of business may be recovered from the goods in the custody or possession of the successor of the business.
    a. This amendment will come into force from date of enactment of the Finance (No.2) Act, 2014.
    b. Only "goods" are covered under this amendment and the immovable property obtained by successor of the business is not subject to be recovered under this provision.

Now, assessee is required to pay interest upto 30% p.a.; required to pre-deposit of 7.5%/10% even in genuine cases and frivolous demands; his CENVAT credit will be lapsed if not taken within six months or payment to service provider is not made within six months. So, all what we can do is just have a hope that "Acche Din Aayenge".

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Service Tax - Recent Judgements

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17 [2014] 41 taxmann.com 347 (Ahmedabad - CESTAT) CESTAT, AHMEDABAD BENCH Gharda Chemicals Ltd. v. Commissioner of Central Excise & Service Tax, Surat

Transfer of invention, design, idea, process, patent and other technical know-how in terms of sale and purchase agreement as a going concern is not liable to service tax under Scientific or Technical Consultancy Services or Intellectual Property Services

a) Facts

Assessee transferred entire property viz. invention, design, idea, process, patent and other technical know-how in terms of sale and purchase agreement as a going concern. Department sought levy of service tax thereon under scientific or technical consultancy services.

Held

It is clear from definition of 'scientific or technical consultancy services' that there should be an advice given by person or an institution to another person. In this case, it had not been brought out by the Revenue as to what advice has been given by seller to buyer. Hence, prima facie, no service tax was leviable under this service and demand was stayed accordingly.

b) Facts

Assessee transferred entire property viz. invention, design, idea, process, patent and other technical know-how in terms of sale and purchase agreement as a going concern. Department sought levy of service tax thereon under Intellectual Property Services.

Held

Intellectual property service is treated to have been rendered only if there is a temporary transfer of some intellectual property or permitting its use. In this case, there was no temporary transfer of intellectual property. Hence, prima facie, no service tax was leviable under this service and demand was stayed accordingly.

18 [2014] 41 taxmann.com 376 (Ahmedabad - CESTAT) CESTAT, AHMEDABAD BENCH State Charge Gog Port of Magdalla v .Commissioner of Central Excise & Service Tax, Surat

Intellectual property rights are rights available with individual/ person; therefore, 'Waterfront royalty charges' recovered by State Government for usage of Waterfront under its sovereign rights cannot be charged to service under Intellectual Property Services.

Facts

Assessee, State Government had collected Waterfront Royalty charges, which were charged by Government of Gujarat from Fort users/private parties for use of such Waterfront. Department sought levy of service tax on such charges under Intellectual Property Services. Assessee argued that: (a) same was a sovereign right of Government, which could not be taxed and (b) even otherwise, though charges were termed as Waterfront Royalty, amount thereof was based upon tonnage of cargo handled at a particular Port, which by any stretch of imagination, could not be covered under definition of Intellectual Property Rights.

Held

Definition of Intellectual Property Rights is about right available within individual or person. Charges collected by assessee-Government for usage of Waterfront as Waterfront Royalty Charges cannot, prima facie, be covered under definition of Intellectual Property Rights. Hence, requirement of pre-deposit was waived.

19 [2014] 41 taxmann.com 371 (Bangalore - CESTAT) CESTAT, BANGALORE BENCH Alchemist HR Services (P.) Ltd. v .Commissioner of Customs & Central Excise, Hyderabad

To attract service tax under 'Manpower Recruitment or Supply Agency', services should be rendered to a client; since students cannot be treated as clients to whom services of recruitment and supply are being rendered, no service tax can be charged on consideration received from them for ensuring employment.

Facts

Assessee was engaged in : (a) enrolling students who have completed courses conducted by Institute of Chartered Financial Analysts of India (ICFAI) and its affiliates and (b) after course was completed, students were assured of employment with various companies/firms with a specified minimum remuneration. Towards this service, assessee was collecting fee of Rs. 3300 from each student in advance. Department sought levy of service tax on such amounts under 'Manpower Recruitment Services'.

Held

To attract Service Tax under category of 'Manpower Recruitment or Supply Agency', services should be rendered to a client. Prima facie, students cannot be treated as clients to whom services of recruitment and supply are being rendered. Hence, requirement of pre-deposit was waived in entirety.

20 [2014] 43 taxmann.com 172 (Mumbai - CESTAT) CESTAT, MUMBAI BENCH Hiranandani Constructions (P.) Ltd. v. Commissioner of Central Excise, Thane

Where assessee-builder was collecting taxes/ charges payable under Maharashtra Ownership of Flats (Regulation) Act, 1963 on actual basis from flat owners, said activity did not, prima facie, amount to Management, Maintenance or Repair Services.

Facts

Assessee-builder, being promoter/executor, was liable to discharge, on behalf of flat owners, payments towards municipal local taxes, property tax, water charges, electric charges, revenue assessment or interest or any mandatory charges under of Maharashtra Ownership of Flats (Regulation) Act, 1963. Assessee was collecting development and maintenance fees from flat buyers prior to handing over of possession and was returning balance amount left after debiting said expenses. Department argued that said activity of assessee amounted to Management, maintenance and repair services. Assessee argued that aforesaid activity did not amount to service and clarified that in respect of various services such as cleaning services, lift maintenance etc., individual service providers had discharged Service Tax.

Held

In view of Section 5 of Maharashtra Ownership of Flats (Regulation) Act, 1963, assessee's activity did not, prima facie, amount to taxable service. Hence, pre-deposit was waived in full .

21 [2014] 44 taxmann.com 474 (Allahabad) HIGH COURT OF ALLAHABAD Indian Coffee Workers Co-operative Society Ltd. v. Commissioner of Central Excise & Service Tax, Allahabad.

An assessee engaged in running and maintenance of canteen or guest houses or engaged in catering at premises belonging to clients, is an outdoor caterer and liable to service tax

Facts

An assessee engaged in running and maintenance of canteen or guest houses or engaged in catering at premises belonging to clients, is an outdoor caterer. Such assessee is liable to service tax on value of services provided by it irrespective of fact that food supplied by assessee is not consumed by client but its employees, workers and guests.

Held

It was held that assessee paying VAT on sale of goods on supply of food and beverages to those who consume them at canteen, would not exclude liability of assessee for payment of service tax in respect of a taxable service provided by assessee as an outdoor caterer. It was further held that there were contrary views which had held the field, a case for imposition of penalty was not made out. The essential ingredients of Section 78 were not fulfilled and hence the penalty would, consequently, have to stand deleted.

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VAT Demystified

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Sale Price under Gujarat VAT

1. **Introduction**

In my last article, I have discussed the concept of deemed sale under works contracts, particularly in the case of construction contracts, In this Article, I have discussed definition of sale price under GVAT Act, with reference to Central Sales Tax Act and also discussed some of the important decisions for better understanding.

2. **Definitions**

2.1 Section 2(23) of Gujarat VAT Act, defines 'Sale'. The next question which comes to our mind is on which value, tax is required to be charged and paid.

2.2 Section 2(24) of Gujarat VAT Act, defines what is sale price, which reads as under:

"sale price" means the amount of valuable consideration **paid or payable** to a dealer or received or receivable by a dealer for any sale of goods made **including the amount of duties** levied or leviable under the Central Excise Tariff Act, 1985 or the Customs Act, 1962 and **any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery** thereof and includes,-

(a) in relation to –

(i) the transfer, otherwise than in pursuance of a contract, of **property in any goods,**

(ii) **the transfer of the right to use any goods** for any purpose, whether or not for a specified period,

(iii) the supply of goods by any **unincorporated association or body of person to a member thereof,**

(iv) the supply by way of or as part of any service or in any other manner whatsoever, of goods, **being food or any other article for human consumption or any drink (whether or not intoxicating),**

the amount of cash, deferred payment or other valuable consideration paid or payable thereof;

(b) in relation to the transfer of property in goods (whether as goods or in some other form) involved in **the execution of a works contract**, such amount as is arrived at by deducting from the amount of valuable consideration paid or payable to a person for the execution of such works contract, **the amount representing labour charges for such execution;**

(c) in relation to the delivery of goods on hire purchase or any system of payment by installments, the amount of valuable consideration payable to a person for such delivery;

Following points emerges from above definition:

- This is an inclusive definition
- Valuable consideration **paid or payable** is chargable to tax,
- Including the **amount of duties** levied or leviable under Central excise or Customes Act,
- Including **any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery,**

- Includes the amount of cash, deferred payment or other valuable consideration paid or payable in relation to :
  - Works Contacts,
  - transfer of the right to use any goods,
  - supply of goods by any unincorporated association or body of person to a member thereof,
  - sale of eatables by hotels restaurants etc.,

  but excluding, **the amount representing labour charges in such execution;**

2.3 Sec 2(h) of CST Act defines, sale price as under:

"sale price" means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof **other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged:**

[Provided that in the case of a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, the sale price of such goods shall be determined in the prescribed manner by making such deduction from the total consideration for the works contract as may be prescribed and such price shall be deemed to be the sale price for the purpose of this clause;]

3. Now question arises :

3.1. Whether discount from sale price is allowed as deduction or not:

There can be two types of situation:

a) Where discount is shown in bill and

b) Where discount is not shown in bill , but given at later date by way of credit note.

i) In the first case, where discount is shown in the bill and VAT is collected on after discount price, we have direct decision of advance rulling authority u/s 80 of Gujart VAT Law in the case of "AnyBody" order dtd: 20-11-2012, wherein Hon'ble Joint Commissioner (legal) has accepted the argument of dealer and held that as per definition of sale price u/s 2(24), *"dealer is liable to pay tax on amount of valuable consideration paid or payable to a dealer or received or recivable by a dealer for any sale of goods"*

It means discount is allowed as deduction and VAT is payable on the amount after deducting discount.

ii) In second case, where discount is not shown in bill, but given at later date by way of credit note, we have decision of Hon'ble Supreme court in the case of IFB Industries Ltd. v/s State of Kerala reported in 49 VST 1 (SC)

In this case, discount was given to customer through credit notes issued subsequent to sale and the sale was disallowed, which was confirmed by Hon'ble Kerala High Court and in appeal before Hon'ble Supreme Court, S.C. while intrepreting Rule 9(a) has held that *"The assessing authority shall not reject the appellants' claim for exemption of the amounts of trade discount solely on the ground that the discount amounts were not shown in the sale invoices."*

Following the above judgement of Hon'ble Supreme Court, Madhya Pradesh High Court in the case of BPL Ltd. v/s Assistant Commissioner, Commercial Tax, Bhopal Division-1, Bhopal (MP) and others 69VST 149(MP) held that :

"The assessees are entitled to deduction under the Madhya Pradesh

Commercial Tax Act, 1994, of discounts allowed by them to retailers based on ordinary trade practice by way of issuing credit note even without showing them in the sale invoice or the bill. "

If we refer to Sec 8(1)(b) Gujart VAT Law read with Rule 43, there is no mandatory requiremet to show discount in the invoice itself.

3.2. Under which circumstances transportation charges and fright is allowed as deduction?

Again there can be two types of situations:

a) Sale complete at the place of seller and

b) Sale complete at the place of buyer

In the first case, it was held in the case of Prakash Retail P Ltd. V.s Deputy Commissioner of Commercial Tax (Audit-14), Dvo-1, Bangalore and others 68 VST 392 (Kar) that-

If the transfer of title of goods is to be at the place of seller then the subsequent charges for transporting goods, installation and other expenditure do not form part of amount for which the goods are sold. If the sale agreement specifies an obligation on the part of the seller to transport the goods as incidental to the sale then the same becomes part of the amount for which the goods are sold.

It was held that, a perusal of the price lists issued by manufacturer showed that the prices were exclusive of installation charges. Further the invoices raised by the petitioners specified that the prices of goods were ex-showroom price. It further specified that transfer of title in goods took place at the place of seller. Therefore, the sale price of the goods **at the ex-showroom price** attracted tax. Subsequent to transfer of title in the goods at the place of seller they acted as agents of customers for transportation of goods and for installation purpose. The invoices produced by the petitioner specified under different heads, the sale price of the goods, the transportation charges and the installation charges .

Therefore the transportation charges and the installation charges did not become the part of sale price of the goods.

In the second case, it was held in the case of India Meters Ltd. v/s State of Tamil Nadu 34 VST 273 (SC), that:

If as per contract the transfer of title to the goods was to take place only on delivery of goods at the customer's place and that the customer's obligation to pay would arise only after the delivery had been so effected, then in such case transportation charges as well as insurance will form part of sale price.

"In the instant case, the obligation to pay freight was clearly on the appellant as there was no sale at all, unless the goods were delivered at the premises of the buyer and in order to so deliver, the assessee necessarily had to incur freight charges."

Above decision is very important in CST Law and as per sec 2(h) of CST Act,

"Sale price means……other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged:

Because of this judgement, if contract is for Delivery at premises of buyer and till that time all risk is on seller and property in goods transferred at buyer's place then even under CST Act, freight and insurance will form part of sale price.

3.3. Any services rendered to customer after delivery, whether value of such service should be included in sale price for the purpose of calculation of tax liability?

An authorised dealer and a selling agent of motor cycles, was collecting handling or service charges for registration with RTO and for arranging smart card to customer.

Whether handling charges collected by dealer can form part of sale price and whether dealer is required to pay VAT on such amount or not.

Bombay High Court in the case of **ADDITIONAL COMMISIONER OF SALES TAX, VAT III, MUMBAI vs. SEHGAL AUTORIDERS PVT. LTD. [2011] 43 VST 398 (Bom) has held that** the goods which formed the subject-matter of the contract between the respondent and its buyer were in a specific and deliverable state. The transfer of property in the goods in pursuance of the sale contract took place against the payment of the price of the goods. The service of facilitating the registration of the vehicles was rendered by the seller-respondent to the buyer and in rendering that service, the seller acted as an agent of the buyer. **Since they did not constitute a sum charged for anything done by the seller in respect of the goods at the time of or before the delivery thereof, such sum cannot be treated as sale price.**

3.4. When customer supplied free material or material like tools, dies, moulds, etc., free of cost to the assessee to enable it to manufacture, whether value of such material can form part of turnover of manufacture for determining sale price?

In the case of V.S Engineering P Ltd. v/s State of Andhra Pradesh 68 VST 87 (AP)

Back Ground of the case:

The petitioner-dealer was engaged in manufacture of railway sleepers and ballast, and manufactured mono block pre-stressed concrete sleepers for broad gauge in accordance with the drawings and specifications issued by the South Central Railways. The dealer was supplied fastenings, malleable cast iron inserts and high tensile strength wire (strands) free of cost, to be incorporated in the concrete sleepers. Both the assessing officer as well as all the authorities including the Tribunal rejected the claim of the dealer that its activity of manufacture and supply of the mono block concrete sleepers to the South Central Railways, was a works contract and held that the dealer's supply was sales of mono block concrete sleepers and that the dealer was liable to pay tax on the value of the free issue material, viz., fastenings, malleable cast iron inserts and high tensile strength wire (strands), which were incorporated and became part of the sleepers. On a revision petition.

Held, allowing the petition, that the cost price that was paid to the dealer did not include the value of free issue material, and the dealer had not collected any sales tax and the railways had not paid any amount on the value representing the free issued material. In that view of the matter, the sale price, for the purpose of section 5 of the Andhra Pradesh General Sales Tax Act, 1957 was the the actual consideration that was received or receivable by the dealer alone that could be the basis for levy of sales tax. The value of free issued materials used in the manufacture of sleepers would not form part of turnover of the manufacturer under section 2(1)(s) of the Andhra Pradesh General Sales Tax Act, 1957.

Case of Ts Tech Sun (India) Ltd. v/s State of Uttar Pradesh and others 15 VST 599 (SC)

Back Ground of the case:

The assessee manufactured plastic automobile components as per design and specifications given. The customer supplied tools, dies, moulds, etc., free of cost to the assessee to enable it to manufacture automobile components.

Held, that amortisation costs of the toolings were not to be included in the sale price of the components for the purpose of trade tax under the U. P. Trade Tax Act, 1948.

4. Conclusion:

I have tried to discuss different situation under which VAT is liable on sale price, there may be many more situations where dispute may arise in determining sale price of goods, under Local Act as well as under CST Act.

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VAT - Recent Judgements and Updates

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[II] IMPORTANT JUDGMENTS:

[A] Important judgment on billing transaction delivered by Hon. Gujarat High Court in case of Madhav Steel Corp. vs. State of Gujarat.

Issue:

Whether The Hon. Tribunal was right in law in holding that the appellant was not entitled to get the Input Tax Credit u/s. 11 of the Act on the ground that the vendor's registration was cancelled ab initio?

Facts:

The appellant has claimed the tax credit on the purchases made from Shree Bhavani Ispat Bhavnagar and is disallowed as vendor's registration certificate has been cancelled ab initio. The appellant has preferred an appeal before the Appellate Authority and after rejection of the appeal by the first Appellate Authority, the appellant has preferred a further appeal before the Hon. Tribunal and the Hon. Tribunal has confirmed the assessment made by the Assessing Officer of disallowing the tax credit. The appellant has gone before the Hon. Gujarat High Court and the Hon. Gujarat High Court has confirmed the Tribunal's order on the ground that the sales transaction of the appellant were found to be non-genuine and it appeared that these were only billing activities and no error has been considered by the A. O. as well as the Hon. Tribunal in denying the Input Tax Credit.

The decision is very much useful to all Practitioners because many cases are pending before various appellate stages and therefore important paragraphs are reproduced hereunder for the benefit of the readers.

[i] It is vehemently submitted by the learned advocate appearing on behalf of the appellants that the learned Tribunal has materially erred in confirming the assessment order denying input tax credit claimed by the respective appellants solely on the ground that the vendor's registration from whom the respective appellants have purchased the goods, has been cancelled retrospectively and ab-initio.

It is submitted that the learned Tribunal has materially erred in not relying upon the decision of the Tribunal in the case of M/.s. Shree Kiran Oil Mill rendered in Second Appeal No. 640/ 2009 in which it was held that the tax credit claimed cannot be disallowed after the date of publication of particulars of cancellation of such dealer where registration certificate of the vendor is cancelled retrospectively. It is submitted that in the present case the Assessing Officer/ Deputy Commissioner, disallowed the appellant's claim of input tax credit on the purchases made from M/s. Shree Bhavani Ispat and M/s. Mangal Enterprise on the ground that the registration certificates of the aforesaid vendors were cancelled ab initio for billing activity. It is submitted that however Assessing Officer as well as the learned Tribunal has not properly appreciated the fact that as such when the appellant made purchases from the aforesaid two vendors, they were having their valid registrations under the Act as well as CST Act and as such the sale transactions were recorded in the account of books of the vendors and even the payments were made through cheques. It is submitted that as such the appellants also produced the relevant documentary evidences such as invoices, weigh bridge, stock register and copy of the account to prove that in fact the transactions between the appellants and the aforesaid two vendors were genuine purchases.

[ii] It is further submitted by the learned AGP appearing on behalf of the State that in the present case the Assessing Officer as well as the learned Tribunal have not disallowed the input tax credit on the purchases made by the respective appellants from their vendors M/s. Shree Bhavani Ispat and M/s. Mangal Enterprise solely on the ground that the

vendors' registration have been cancelled retrospectively and cancelled ab initio. It is submitted that over and above the fact that their respective vendors failed to prove their purchases from different 23 dealers and therefore, they were not in a position to sell any goods to the respective appellants in the present case i.e. to the dealers herein, there is a specific finding given by the Assessing Officer that as such the respective appellants/ dealers have failed to prove by cogent evidences that in fact the sale transactions were genuine and/or there were movement of goods. It is submitted that therefore when the respective appellants/dealers have failed to prove the genuineness of the sale transactions and actual movement of goods, the finding recorded by the Assessing Officer as well as the learned Tribunal that the sale transactions are not genuine and there were only billing activities only for the purpose of getting the tax credit and looking to the modus operandi of evading the taxes, both the Assessing Officer as well as the learned Tribunal have rightly denied the input tax credit claimed by the respective appellants claimed under section 11 of the ACT. It is submitted that as such the denial of input credit claimed by the respective dealers/appellants is absolutely in consonance with the provisions of the Act more particularly section 11 of the Act.

It is submitted that as such the onus is upon the dealer, who claimed the input tax credit, to prove the genuineness of the transactions, which the appellants/dealers have failed to establish and prove. It is submitted that therefore in the facts and circumstances of the case, the decision of the Tribunal in the case of M/s. Kiran Oil Mill is not rightly applied by the Assessing Officer as well as the learned Tribunal.

It is submitted that accordingly in the above circumstances, the government suffers huge revenue loss. The Government cannot collect tax on sale by A to C as it is neither recorded in the books of account of A nor C. However, the Government is less concerned about transaction between A & C as C does not demand input tax credit on its purchases qua A. Further as regards the transaction between B & C, as B is involved in billing activities, so normally it will not deposit the tax collected from C in the Government Treasury. B is a dealer engaged in billing activities. After registration, B issues bogus bills on commission basis. So before revenue authorities come to know about the activities of B, B would have earned a huge amount of commission. Normally B does not file return. After a certain period when B believes that now it may get caught by the revenue, B applies for cancellation of registration. Many times it is found that dealer B (engaged in bogus billing) is absconding.

[iii] Now, so far as the contention on behalf of the appellants/dealers that as, when they purchased the goods from the aforesaid two vendors, both the aforesaid two vendors were having the registration and their registration came to be cancelled subsequently retrospectively and therefore, they cannot be denied the input tax credit on the purchases made by them, made from the aforesaid two vendors is concerned, it is required to be noted that in the present case the input tax credit/s have not been denied solely on the Aforesaid ground. The input tax credit has/have been denied also on the ground that the respective appellant/s – dealer/s have failed to prove the actual physical movement of the goods alleged to have been purchased by them from the aforesaid vendors and therefore, it is held that there was no actual physical movement of the goods and therefore, the sale transaction is/are not genuine And it was only billing activities to defraud the government.

[iv] Considering the above facts and circumstances of the case and when the appellant/s – dealer/s have failed to satisfy/prove the actual physical movement of the goods alleged to have been purchased by them from the aforesaid two vendors on which the input tax credit have been claimed and when the sale transactions are found to be not genuine and it appears that there were only billing activities, we are of the opinion that no error has been committed by the Assessing Officer as well as learned Tribunal in denying the input tax credit. Under the circumstances, as such the proposed substantial questions of law referred to herein above are answered against the appellant/s – dealer/s and in favour of Revenue.

[B] The important judgment delivered by the Hon. Tribunal in case of M/s. Keshav Till Factory & M/s. Shyam Industries on wide meaning of Manufacturing Activities.

Issue:

In case of M/s. Keshav Till Factory, the appellant is carrying on the business of buying natural Till and after processing the same, the appellant is selling it. It is mechanically dried and after removing the husk by process of washing through caustic soda, pure till is exported.

The question is whether this process is a manufacturing activity or not?

In case of Shyam Industries, the appellant is also an Exporter in the commodity of Huld Sesame (H.S). The appellant has purchased natural sesame seeds from various dealers and the same are being cleaned through machineries and thereafter Natural Sesame Seeds (NSS) are being graded to the required specimen by the Foreign Buyers. The said grading depends upon the shape and size of the NSS. Thereafter NSS is washed through caustic soda. The entire process is done mechanically. After washing through caustic soda, the NSS enters into the process of drying and after drying, the upper layer is removed from the NSS and is converted into H.S. The question is whether the above process is a manufacturing activity or not?

The decision is very much important in day to-day practice and therefore the important paragraphs of the judgment are reproduced hereunder for the benefit of the readers.

[i] After discussing the definition of "Manufacture" under the Gujarat Vat Act, the appellant had relied on the decision of Hon'ble Gujarat High Court in the case of M/s. Laxmi Oil Mills Ltd. vs. Commissioner of Sales Tax, Ahmedabad 92 STC 174 which can be said to be directly on the issue involved in the present appeals and the definition of the word 'manufacture' under the Gujarat Sales Tax Act, 1969 was considered therein. It was held that section 2(16) gives a very wide definition of manufacture and includes several activities such as extracting, collecting, altering, ornamenting, finishing or otherwise processing. It also excludes several processing activities mentioned in rule 3 of the Gujarat Sales Tax Rules, 1970, though these may amount to manufacture as commonly known. It was therefore held that the ordinary meaning of the word manufacture would be of no relevance and the statutory meaning given to the word manufacture under sub-section (16) of section 2 is required to be considered in each case. If the nature of goods is changed by the process which are covered by the definition given in section 2(16), then it would amount to a manufacturing process.

Based on the aforesaid decisions, relied upon by the appellant, it is quite clear that for the purpose of interpretation firstly the definition given under the statute has to be looked into. Applying the above principles, if the definition of manufacture is taken into consideration then it is quite evident that the process undertaken by the appellant i.e. cleaning, drying and brushing with chemicals and removing of upper layer (fotri) of NSS as per the requirement of the customer and converting it into either dehusk till or HS, squarely falls within the four corners of the definition of 'manufacture' as provided u/s. 2(14) of the Act. When the process carried out by the appellant squarely falls within the categories stated in the definition of 'manufacture' then the requirement to see or examine as to whether a new, distinct and different commodity emerges or not also does not arise.

In the light of the foregoing discussion, provisions of Gujarat Vat and position of law, the Tribunal is of the view that the respondents are not justified in holding that the process undertaken by the appellant does not amount to manufacture, the Tribunal, therefore, reverses their finding and holds that the activity undertaken by the appellant clearly amounts to manufacture and hence the appellants are held to be entitled to input tax credit of raw materials, processing materials, fuel and capital goods in consonance with the provisions contained in section 11 of the Gujarat Vat Act. Since the appellants succeed on the main issue and the levy of tax is not justified, there is no question of charging any interest or levy of penalty on this count.

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Business Valuation

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Approaches to Valuation

Asset Approach

The Asset Approach

The Asset-based valuation approach involves methods of determining a company's value by analyzing the value of a company's assets. This approach often serves as a valuation floor since most companies have greater value as a going concern than they would if liquidated, i.e., the present value of future cash flows generated by the assets usually far exceed the liquidation value of those assets. This difference between the asset value and going concern value is normally attributable to "intangibles". An exception to this might be a low-margin business in a competitive industry that owns its immovable properties, which has appreciated over time due to its development value. In this case, the asset value may exceed the going concern value of the business.

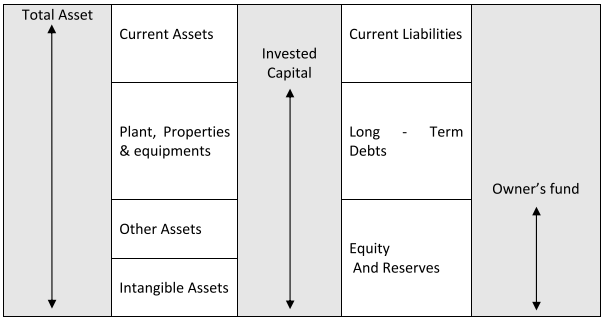
Asset approach is generally preferred to value intangible asset (like brands, patents, goodwill etc) of the business. (We will go through valuation of intangible assets in next article)

This methodology is likely to be appropriate for a business whose value derives mainly from the underlying value of its assets rather than its earnings, such as property holding and investment business. This method may also be appropriate for a business that is not making an adequate return on assets and for which a greater value can be realized by liquidating the business and selling its assets. Net asset values, which are of great relevance in industries such as utilities, manufacturing and transport that are dependent on physical infrastructure and assets, may not have particular significance in industries such as information technology, pharmaceutical that are driven by intangibles not recorded in the books.

Given that the most business valuations are typically conducted under the premise of a going concern, the appraiser may decide that the asset approach is inappropriate for determining an indication of value. However, the appraiser may test if the company is worth more in liquidation as opposed to as a going concern by utilizing an asset approach.

Following figure shows a business value based on asset approach.

Valuation Balance Sheet



Companies Act, 2013 draft Rules cover most of the frequently used methods of valuation as well as permit valuers to apply other methods as appropriate and justified. The Rules provides that the valuation of any asset as on valuation date shall be made in accordance with any one or more of the following methods: (Sr. No. 1, 7 and 9 are fundamentally based on asset approach. Value may be determined using methods mentioned in Sr. No. 2, 8 and 10 based on asset approach or other approaches)

1. **Net asset value method**
2. Market Price method
3. Yield method / Profit Earning Capacity Value (PECV)
4. Discounted Cash Flow Method (DCF)
5. Comparable Companies Multiples Methodology (CCM)

6. Comparable Transaction Multiples Method (CTM)
7. **Price of Recent Investment method (PORI)**
8. Sum of the parts valuation (SOTP)
9. **Liquidation value**
10. Weighted Average Method
11. Any other method accepted or notified by the Reserve Bank of India, Securities and Exchange Board or Income Tax Authorities.
12. Any other method(s) that the valuer may deem fit to adopt in the given circumstances of the case, provided that adequate justification for use of such method(s) (and not any of the methods above) must be included in the report.

CCI guidelines, 1990 (para 6.1) state that *"The net asset value, as at the latest audited balance-sheet date, will be calculated starting from the total assets of the Company or of the branch and deducting there from all debts, dues, borrowings and liabilities, including current and likely contingent liabilities and preference capital, if any. In other words, it should represent the true "net worth" of the business after providing for all outside present and potential liabilities. In the case of companies, the net asset value as calculated from the asset side of the balance-sheet in the above manner will be cross checked with equity share capital plus free reserves and surplus, less the likely contingent liabilities.*"

Assets Valuation Methodology

Net Assets value represents owners' value which is arrived at after reducing all external liabilities and preference shareholders claims, if any, from the aggregate value of all assets, as valued and stated in the Balance Sheet as on valuation date.

Some adjustments may be considered depending upon the particular case while arriving at net asset value. Few are listed below:

- Contingent Liabilities

  The amount of Contingent Liabilities as disclosed in the financial statements of the entity needs to be adjusted from the value of net assets. If necessary, legal opinion regarding sustainability of claims or contingent liabilities should be called for. Some examples of Contingent liabilities are:

  1. Tax demands (income tax, excise, VAT etc)
  2. Claims from customers
  3. Contractual obligations
  4. Matters referred to Arbitrations
  5. Labour related issues

- Contingent Assets

  If the company has made escalation claims, insurance claims or other similar claims, then the possibility of their recovery should be carefully made on a fair basis, particularly having regard to the time frame in which they are likely to be recovered. The likely cost to be incurred for realizing the amount needs to be adjusted.

- Qualifications & Notes to Accounts

  Qualifications in the Auditors report and notes to accounts should also be given due consideration. If it calls for any adjustment, the same should be carried out. e.g. diminution in the value of long term investments not provided for, provision for gratuity and leave encashment not made, provision for doubtful debts not made, etc.

Different Techniques of Asset Valuation

Some of the most common techniques of valuation considered under this approach are to value a business enterprise on the basis of book value of the assets or Adjusted book value of the assets or at Replacement value or applying cost to create approach or just deriving the liquidation proceeds.

Book value or Adjusted book value:

Book value is simply a value based upon the accounting books of the business. In simple term, Assets less liabilities equals the owners' equity, which is the "Book Value" of the business.

Net Assets Value = Total Assets (excluding Miscellaneous Expenditure & Debit balance of Profit & Loss account) – Total Liabilities

Or

Net Assets Value = Share Capital + Reserves (excluding revaluation reserves) — Miscellaneous Expenditure – Debit Balance of Profit & Loss Account

Adjusted book value is preferred over book value because it involves reviewing each and every asset and liability on the company's balance sheet and adjusting it to reflect its estimated market value. Depending on the mix of assets owned by the company, other types of appraisers (e.g., property valuer, machinery and equipment valuer) might need to be consulted as part of the valuation process. In addition, it is important to consider intangible items that might not necessarily be reflected on the balance sheet, but which might have considerable value to a user, such as trade names, patents, etc. The unrecorded and contingent liabilities are also considered at their fairly estimated value.

Is it possible for book value to be a reasonable proxy for the true value of a business? For mature firms with predominantly fixed assets, little or no growth opportunities and no potential for excess returns, the book value of the assets may yield a reasonable measure of the true value of these firms. For firms with significant growth opportunities in businesses where they can generate excess returns, book values will be very different from true value.

Replacement value or Price of recent investment method and Cost to create value:

Replacement value or price of recent investment is a least value that a seller will insist from buyer who otherwise would have to expend for getting such assets and creating such liabilities. It is a value at which the similar assets (and liabilities also) can be replaced with existing assets of the business.

"Cost to create" value is basically from the view point of the buyer or investor. In case of business purchase, the buyer or investor would like to know the cost that he may have to incur for purchase of the assets (and liabilities also) in similar conditions or bringing the identical assets to the place of use. The cost to build similar intangible worth or asset for the business is also considered. The value so derived can help him to negotiate a fair price.

Liquidation value or net realizable value

Generally, while offering a business for sell, a seller would like to know the least value of the business that he or she can get on just liquidating the business assets. This value can help to negotiate a better price.

Liquidation analysis should be considered when the value of the business, on a control basis as determined by the income or market approaches, is low relative to the net asset value. Application of the liquidation approach must consider the expenses associated with liquidation, including taxes, selling expenses and plant closing costs, and the risk and timing related to the proceeds.

Asset Based Method may not be relevant in case of companies operating in an industry where human knowledge and creativity are more relevant as compared to physical assets in value creation. In such cases, the Earnings Based Methods may be adopted. Net Assets Method may sometimes be used as a backup to support the value arrived at as per other methods.

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Corporate Law Update

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(A) MCA UPDATES:

1. Certification of E-forms/ non e-forms under the Companies Act, 2013 by the Practicing Professionals:

- The Ministry has clarified that where any instance of filing of documents, application or return or petition etc. containing false or misleading information or omission of material fact or incomplete information is observed, the Regional Director or the Registrar, shall conduct a quick inquiry against the professionals who certified the form and signatory thereof including an officer in default who appears prima facie responsible for submitting false or misleading or incorrect information pursuant to requirement of the prescribed Rules; 15 days notice may be given for the purpose.
- The Regional Director or the Registrar will submit his/her report in respect of the inquiry initiated, irrespective of the outcome, to the E -Governance cell of the Ministry within 15 days of the expiry of period given for submission of an explanation with recommendation in initiating action u/s 447 and 448 of the Companies Act, 2013 wherever applicable and also regarding referral of the matter to the concerned professional Institute for initiating disciplinary proceedings.
- The E-Gov cell of the Ministry shall process each case so referred and issue necessary instructions to the Regional Director/ Registrar of Companies for initiating action u/s 448 and 449 of the Act wherever prima facie cases have been made out. The E-Gov cell will thereafter refer such cases to the concerned Institute for conducting disciplinary proceedings against the errant member as well as debar the concerned professional from filing any document on the MCA portal in future.

[General Circular-10/2014 dated 07th May, 2014]

2. One time opportunity for extension of Period of Reservation of Name:

- Many stakeholders had reserved names for the purpose of Company incorporation with 60 days prescribed validity expiring during the above mentioned period but they could not avail of the 60 days prescribed period for using the name to complete the corresponding incorporation requirements due to the non-availability of services on the MCA21 portal to stakeholders from 1st April, 2014 to 28th April, 2014, hence, the MCA has extended the validity of reservation up to 31st May, 2014, of all such names with due date of expiry between 1st April, 2014 to 28th April, 2014.

[General Circular-11/2014 dated 12th May, 2014]

3. Applicability of PAN requirement for Foreign Nationals.

- To remove the difficulties being faced by Foreign Nationals while filing Incorporation form (lNC-7) due to mandatory requirement of submission of PAN details of intending Directors at the time of filing the application for incorporation, the MCA has clarified that PAN details are mandatory only for those foreign nationals who are required to possess "PAN" in terms of provisions of the Income Tax Act, 1961 on the date of application for incorporation.
- Where the intending Director who is a Foreign National is not required to compulsorily possess PAN, it will be sufficient for such a person to furnish his/ her passport number, alongwith undertaking stating that provisions of mandatory applicability of PAN are not applicable to the person concerned.

[General Circular-12/2014 dated 22nd May, 2014]

4. Extension of validity period for names reserved as on 31st March, 2014.

- In continuation of the General Circular No. 11/2014 dated 12/05/2014, approval of the

Competent Authority is hereby conveyed to extend continuity of all reserved names as on 31st March 2014 for another fifteen days period from the date of issue of this circular.

[General Circular-13/2014 dated 23/05/2014]

5. Clarifications on Rules prescribed under the Companies Act, 2013 – Matters relating to appointment and qualifications of directors and Independent Directors. :

(i) Section 149(6)(c): "pecuniary interest in certain transactions" :—

- The MCA has clarified that in view of the provisions of section 188 which take away transactions in the ordinary course of business at arm's length price from the purview of related party transactions, an 'ID' will not be said to have 'pecuniary relationship' under section 149(6)(c) in such cases.
- It is also clarified that 'pecuniary relationship' provided in section 149(6)(c) of the Act does not include receipt of remuneration, from one or more companies, by way of fee provided under sub—section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission approved by the members, in accordance with the provisions of the Act.

(ii) Section 149: Appointment of 'IDs':

- Explanation to section l49(1l) clearly provides that any tenure of an 'ID' on the date of commencement of the Act shall not be counted for his appointment/ holding office of director under the Act. In view of the transitional period of one year provided under section 149(5), it is hereby clarified that it would be necessary that if it is intended to appoint existing 'IDs' under the new Act, such appointment shall be made expressly under section l49 (10)/ (11) read with Schedule IV of the Act within one year from 13th April, 2014, subject to compliance with eligibility and other prescribed conditions.

(iii) Section l49(10)/(11) – Appointment of 'IDs' for less than 5 years:-

- The MCA has clarified that section l49(10) of the Act provides for a term of "up to five consecutive years" for an 'ID'. As such while appointment of an 'ID' for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term under section l49(10) of the Act. Further, under section l49 (11) of the Act, no person can hold office of 'ID' for more than 'two consecutive terms'. Such a person shall have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years.
- In such a case the person completing 'consecutive terms of less than ten years' shall be eligible for appointment only after the expiry of the requisite coo1ing—off period of three years.

(iv) Appointment of 'IDs' through letter of appointment:—

- The MCA has clarified that in view of the specific provisions of Schedule IV, appointment of 'IDs' under the new Act would need to be formalized through a letter of appointment even in case of appointment of existing 'IDs' .

[General Circular-14/2014 dated 09/06/2014]

6. Clarification regarding maintaining register in new format [sub-section (9) of section 186]:

- The Ministry has clarified that registers maintained by companies for loans/ guarantee/security/making acquisition pursuant to sub-section (5) of Section 372A of Companies Act,1956 may continue as per requirements under these provisions and the new format prescribed vide Form MBP-2 shall be used for particulars entered in such registers on and from 01/04/2014.

[**General Circular-15/2014 dated 09/06/2014]**

7. Applicability of PAN requirement for Foreign Nationals :

- In continuation of the General Circular No. 12/2014 dated 22.05.2014 regards the above subject, the MCA has clarified that the provisions of the said Circular are applicable to a Foreign National who is a subscriber / promoter at the time of incorporation of the Company.

- In case, the said subscriber/promoter does not possess Permanent Account Number (PAN), he / she shall furnish a declaration in the prescribed proforma, as an attachment to the Incorporation Form (INC-7).
- MCA has further clarified that, in case of a Resident Director of the proposed company he/ she shall be required to submit PAN details at the time of incorporation.

[General Circular-16/2014 dated 10/06/2014]

8. Filling of MGT-10:

- In continuation of General Circular No. 06/ 2014 dated 29.03.2014 and 09/2014 dated 25.04.2014, MCA has clarified that stakeholders are required to fill Form MGT-10 physically, get it duly signed/certified by a professional and file it along with other required enclosures as attachments with the prescribed General E-form No. GNL-2.
- This temporary arrangement will continue till an E-Form for MGT-10 is made available. Fee applicable for MGT-10 will be as per the Table of Fees prescribed in Companies (Registration Offices and Fees) Rules, 2014.

[General Circular-17/2014 dated 11/06/2014]

9. Clarification for filing of Form No. INC-27 for conversion of company from public to private under the provisions of Companies Act, 2013:

- As the relevant provisions of Companies Act, 2013 (second proviso to sub-section (1) and sub-section (2) of section 14) have not been notified, the MCA has clarified that in view of this, the corresponding provisions of Companies Act, 1956 (Proviso to sub-section (1) and sub-section (2A) of Section 31) shall remain in force till corresponding provisions of Companies Act, 2013 are notified.
- The Central Government has delegated such powers under the Companies Act, 1956 to the Registrar of Companies (ROCs) vide item No. (c) of the notification number S.O. 1538(E) dated the 10th July 2012 and this delegated power remains in force.
- Applications for such conversions, therefore, have to be filed and disposed as per the earlier provisions.

[General Circular-18/2014 dated 11/06/2014]

10. Clarifications on Rules prescribed under the Companies Act, 2013 – Matters relating to share capital and debentures :

(i) Share Transfer Forms executed before 1st April, 2014:—

- In case of the Share Transfer Forms executed before 1st April, 2014 as per earlier Form 7B but which are yet to be accepted / registered by companies, the MCA has clarified since the transaction relating to transfer of shares is a contract between two or more persons / shareholders, any share transfer form executed before 15th April, 2014 and submitted to the company concerned within the period prescribed under relevant section of the Companies Act, 1956 needs to be accepted by the companies for registration of transfers.
- In case any such share transfer form, executed prior to 1st April, 2014, is not submitted within the prescribed period under the Companies Act, 1956, the concerned company may get itself satisfied suitably with regard to justification of delay in submission etc.
- In case a company decides not to accept the share transfer form, it shall convey the reasons for such non-acceptance within time provided under section 56(4)(c) of the Act.

(ii) Delegation of powers by board under rule 6(2)(a):

- The MCA has clarified that the powers of the Board provided under rule 6(2)(a) of companies (Share Capital and Debentures) Rules, 2014 with regard to issue of duplicate share certificates can be exercised by a Committee of Directors, subject to any regulations imposed by the Board in this regard.

[General Circular-19/2014 dated 12/06/2014]

11. Clarification with regard to voting through electronic means:

- The MCA has noticed that compliance with procedural requirements, engagement of Depository Agencies and the need for clarity on matter like demand for poll/postal ballot etc will take some more time. Accordingly, it has decided not to treat the relevant provisions as mandatory till 31st December, 2OI4.

[General Circular-20/2014 dated 17/06/2014]

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From Published Accounts

CA. Pamil H. Shah
pamil_shah@yahoo.com

AS – 29 Provisions, Contingent Liabilities and Contingent Assets

Annual Report 2013-14

Chemfab Alkalis Limited

Provisions involving substantial degree of estimation in measurement are recognized when there is a present obligation as a result of past events and it is probable that there will be outflow of resources. Contingent Liabilities are not recognised, but are disclosed in the notes. Contingent assets are neither recognised nor disclosed in the financial statements.

South Indian Bank

In accordance with Accounting Standard 29, Provisions, Contingent Liabilities and Contingent Assets specified in Companies (Accounting Standards) Rules, 2006, the Bank recognizes provisions when it has a present obligation as a result of a past event, it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation and when a reliable estimate of the amount of the obligation can be made.

Provisions are determined based on management estimate required to settle the obligation at the balance sheet date, supplemented by experience of similar transactions. These are reviewed at each balance sheet date and adjusted to reflect the current management estimates. In cases where the available information indicates that the loss on the contingency is reasonably possible but the amount of loss cannot be reasonably estimated, a disclosure is made in the financial statements.

Contingent assets, if any, are not recognized or disclosed in the financial statements.

Claris Lifescience Limited

Provisions involving substantial degree of estimation in measurement are recognized when there is a present obligation as a result of past events and it is probable that there will be an outflow of resources. Contingent liabilities are not recognized but are disclosed in the notes to the financial statements. Contingent assets are neither recognized nor disclosed in the financial statements.

CMC Limited

A provision is recognized when the Company has a present obligation as a result of past events and it is probable that an outflow of resources will be required to settle the obligation in respect of which a reliable estimate can be made. Provisions (excluding retirement benefits) are not discounted to their present value and are determined based on the best estimate required to settle the obligation at the balance sheet date. These are reviewed at each Balance Sheet date and adjusted to reflect the current best estimates. Contingent liabilities are disclosed in the note 28.1. Contingent assets are not recognized in the financial statements.

ICICI Bank Limited

The Bank estimates the probability of any loss that might be incurred on outcome of contingencies on the basis of information available up to the date on which the financial statements are prepared. A provision is recognized when an enterprise has a present obligation as a result of a past event and it is probable that an outflow of resources will be required to settle the obligation, in respect of which a reliable estimate can be made. Provisions are determined based on management estimates of amounts required to settle the obligation at the balance sheet date, supplemented by experience of similar transactions. These are reviewed at each balance sheet date and adjusted to reflect the current

management estimates. In cases where the available information indicates that the loss on the contingency is reasonably possible but the amount of loss cannot be reasonably estimated, a disclosure to this effect is made in the financial statements. In case of remote possibility neither provision nor disclosure is made in the financial statements. The Bank does not account for or disclose contingent assets, if any.

Reliance Industries Limited

Provision is recognized in the accounts when there is a present obligation as a result of past event(s) and it is probable that an outflow of resources will be required to settle the obligation and a reliable estimate can be made. Provisions are not discounted to their present value and are determined based on the best estimate required to settle the obligation at the reporting date. These estimates are reviewed at each reporting date and adjusted to reflect the current best estimates.

Contingent liabilities are disclosed unless the possibility of outflow of resources is remote.

Contingent assets are neither recognized nor disclosed in the financial statements.

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contd. from page 290

(i) In case of listed companies :(a) Issue and transfer of shares including CCPS and CCD shall be as per the SEBI guidelines;(b) The pricing guidelines for FDI instruments with optionality clauses shall continue to be in accordance with A.P. (DIR Series) Circular No. 86 dated January 9, 2014, i.e., the non-resident investor shall be eligible to exit at the market price prevailing on the recognised stock exchanges subject to lock-in period as stipulated, without any assured return.

(ii) In case of unlisted companies : The issue and transfer of shares including CCPS and CCD with or without optionality clauses shall be at a price worked out as per any internationally accepted pricing methodology on arm's length basis. Thus, the guiding principle will be that the non-resident investor is not guaranteed any assured exit price at the time of making such investment/agreement and shall exit at a fair price computed as above at the time of exit subject to lock-in period requirement as applicable in terms of A.P. (DIR Series) Circular No. 86 dated January 9, 2014.

For full text refer to: A.P. (DIR Series) Circular No.4

http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=9106

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From the Government

CA. Kunal A. Shah
cakashah@gmail.com

Income Tax

1) Notification regarding changes in form 3CA. 3CB and 3CD

CBDT has substituted Form no. 3CA, 3CB and 3CD by making changes in the Income Tax Rules,1962 which shall come into force from the date of their publication in the Official Gazette. **(For full text refer Notification no. 33, dated 25/07/2014)**

Service Tax

1) Notification regarding amendments in Mega Notification no.25/2012

The said notification seeks to amend with immediate effect certain existing entries granting exemption on specified services and inserting new entries for granting exemption from service tax on specified services.

(For full text refer Notification 06/2014, dated 11th, July,2014)

2) Notification regarding amendments in Notification no.12/2013

Amendment in Notification No.12/2013 – Procedure for SEZ related exemption has been simplified with immediate effect.

(For full text refer Notification 07/2014, dated 11th July,2014)

3) Notification regarding amendments in Notification no. 26/2012-abatement rates

The condition for availing abatement in case of goods transport agency service is being amended with immediate effect to clarify that the condition for non-availment of credit is required to be satisfied by the service providers only. Service recipient will not be required to establish satisfaction of this condition by the service provider.**(For full text refer Notification 08/2014, dated 11th July,2014)**

4) Notification regarding amendment in Service Tax Rules,1994

a) In the said notification following services are brought under Reverse Charge Mechanism with immediate effect:-

   i) service provided by a Director to a body corporate(the word company is being replaced by the word body corporate);

   ii) service provided by Recovery Agents to Banks, Financial Institutions and NBFC.

b) Mandatory e-payment of service tax for all the assesses w.e.f. 01/10/2014.

(For full text refer Notification 09/2014, dated 11th July,2014)

5) Notification regarding amendment in Notification No. 30/2012

The notification amends the entry 7(b) of notification no.30/2012, whereby in case of renting of motor vehicle, where the service provider does not take abatement, the portion of service tax payable by the service provider and service receiver will be modified as 50% each instead of 40 % and 60% respectively with effect from 01-10-2014. **(For full text refer Notification 10/2014, dated 11th July,2014)**

6) Notification regarding amendment in Valuation of Works Contract

W.e.f. 01-10-2014 in Rule 2A of the Service Tax (Determination of Value) Rules,2006 ,the category 'B' and 'C' of works contracts with percentage of service portion of 70% and 60% respectively are proposed to be merged into one single category with 70% of service portion **(For full text refer Notification 11/2014, dated 11th July,2014)**

7) Notification regarding variable rate of Interest

The said notification prescribes rate of Interest for late payment of service tax. The rate of interest would vary depending upon the extent of delay from 18% to 30% **(For full text refer Notification 12/2014, dated 11th July,2014) (w.e.f. 01-10-2014)**

8) Notification regarding Point of Taxation Rules

The first Proviso to rule 7 of the Point of Taxation Rules(POTR) is amended to provide that point of taxation in case of reverse charge, will be the payment date or first day, after 3 months from the date of invoice, whichever is earlier. **(For full text refer Notification 13/ 2014, dated 11th July,2014)(w.e.f. 01-10-2014)**

9) Notification regarding Amendment in Place of Provision of Service Rules,2012.

i) In case of temporary import of goods into India for repairs, Rule 4 will not apply if the goods are exported after repairs without being put to any use in the taxable territory.ie. general rule 3 may apply and if service recipient is located outside taxable territory such services will not be liable to service tax.

ii) The definition of the word 'Intermediary' is amended to include the intermediary of goods in its scope. Hence the commission agent or consignment agent shall be covered in rule 9© of the POPR Rules.

iii) Services of hiring of Vessels (excluding yachts) and Aircraft are excluded from rule 9(d).Thus, hiring of aircraft or vessels irrespective of period of hiring is covered by general Rule 3 i.e. the place of location of the service receiver [Rule 9(d)]. **(For full text refer Notification 14/2014, dated 11th July,2014)(w.e.f. 01-10-2014)**

10) Notification regarding Advance Ruling

The resident private limited company is being included as a class of person for the benefit of Advance Ruling with immediate effect. **(For full text refer Notification 15/2014, dated 11th July,2014)**

11) Circular regarding Manner of Distribution of common input service credit

It is hereby clarified that the distribution of cenvat credit for the purpose of rule 7(d) would not be restricted to those units were the service are used but will be distributed in the ratio of turnover in all cases irrespective of whether such common input service were used in all the units or in some of the units. **(For full text refer Circular No. 178/2014, dated 11th July,2014)**

Wealth Tax

1) CBDT has issued Instructions for filing up return of Net Wealth in FORM BB for AY 14-15.

(For full text refer www.incometaxindia.gov.in)

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Association News

CA. Abhishek J. Jain
Hon. Secretary

CA. Nirav R. Choksi
Hon. Secretary

Forthcoming Programmes

Date/Day	Time	Programmes	Speaker	Venue
02.09.2014 Tuesday	5.30 p.m. to 7.30 p.m.	4th Study Circle Meeting on "Tax Audit - Reporting Requirement Compliance"	CA. Chirag M. Shah	H. K. College Conference Hall, Ashram Road, Ahmedabad

5th Knowledge Clinic

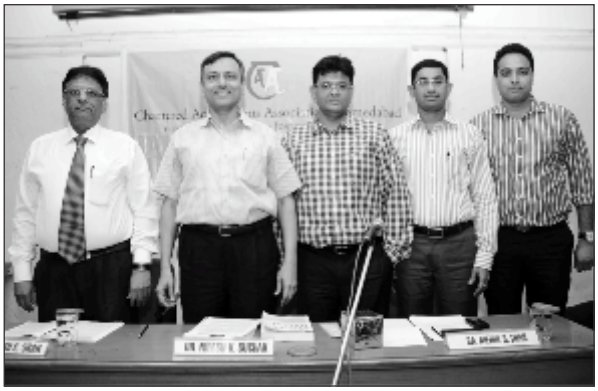
5th Knowledge Clinic is scheduled to be held on Friday, 29th August 2014 at the Association's office from 3.30 pm to 4.30 pm. Members having queries on the subject of Professional Interest may send by email or by hand delivery on or before 22nd August 2014.

Glimpses of events gone by:

A Lecture Meeting on "Technical Aspects of Finance Bill, 2014" was jointly held with Ahmedabad Branch of WIRC of ICAI at Tagore Hall, Paldi, Ahmedabad on 14th July, 2014.

Release of Budget Booklet of Finance Bill, 2014 (L to R CA. Aniket S. Talati, CA. Abhishek J. Jain, CA. Mukesh M. Khandwala, Speaker Shri Saurabh N. Soparkar, CA. Shailesh C. Shah, CA. Atul R. Shah, CA. Vikash Jain)

3rd Study Circle Meeting held on 18th July 2014 "Understanding Important Provisions of Budget 2014 at H.K. College of Commerce Conference Hall, Ahmedabad.



(L to R, CA. Shailesh C. Shah, Speaker Dr. Nilesh Suchak, Speaker CA. Jignesh Shah, CA. Mehul Shah, CA. Abhishek J. Jain)

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Representation to CBDT on changes in Form No. 3CA, 3CB and 3CD

31st July, 2014

To,
The Chairman
Central Board of Direct Taxes
New Delhi

Respected Sir,

Sub: Representation on changes in the utility/ software for e-filing of tax audit report.

1.0 Introduction

1.1 The Revenue department has made e-filing of the Tax Audit Report along with the income tax return mandatory from assessment year 2013-14 and onwards vide notification dated 01st May, 2013. The utility or software for e-filing of the tax audit report was introduced for the first time in the month of July, 2013.

1.2 However, due to several discrepancies in the said utility, the same had undergone changes for as many as 12 times on several representations being made by the professionals, after finding out inconsistencies in the utility.

1.3 The CBDT has once again, vide notification no. 33/2014 dated 25.07.2014 revised the format of the Tax Audit Report to be furnished by the assessees.

1.4 Out of the various changes suggested, one of the changes that would have a far reaching impact is the change related to the compliance with the TDS Provisions.

2.0 Issues relating to TDS/TCS in the New Format

2.1 In addition to the details of TDS/TCS, the Auditor is now required to disclose the amount short deducted, TAN of the Assessee, Amount on which tax is deducted or collected, amount paid and also details of amount of TDS/TCS not paid by the Assessee. Earlier reporting was only of TDS but now it is been extended to TCS also. (Clause 34(a)).

2.2 In old 3CD form Auditor was not required to report any late filing of TDS or TCS return. However vide Clause 34(b) Auditor has to give details of Late filing of TDS/TCS return.

2.3 In old 3CD from Auditor was not required to report detail of Interest payable for delay in payment of TDS/TCS. However vide Clause 34(c) the Auditor has to give details of Interest Payable u/s 201(1A) and 206C (7).

3.0 Other Issues and Changes

3.1 Apart from the changes in the TDS/TCS reporting requirements, the other key takeaways from the new Form 3CD include the following:

1. Specifying the nature of documents examined by the Auditor in the course of tax audit.
2. A tabular format is specified for reporting of financial impact of changes in the method of stock valuation.
3. Details of land or building transferred by assessee for less than stamp duty value (under section 43CA or under section 50C) shall be reported in new Form 3CD
4. Old Form3CD required reporting of inadmissible payments only when they were debited to Profit and loss account. However, the new Form 3CD requires reporting of following disallowable payments, even if they are not debited to profit and loss account*[clause 21 of Part B]*:
   (i) Disallowance for TDS default under Section 40(a)
   (ii) Disallowance for cash payments under section 40A(3)
   (iii) Disallowance for provision for gratuity under section 40A(7)
   (iv) Disallowance under Section 40A(9)
   (v) Particulars of any liability of a contingent nature
   (vi) Amount of deduction inadmissible under section 14A
   (vii) Interest inadmissible under the proviso to section 36(1)(iii)
5. The new Form seeks details of demand raised or refund issued under any tax laws (other than Income Tax Act, 1961 and Wealth Tax Act, 1957) along with details of relevant proceedings.
6. The new 3CD requires whether the assessee is liable to pay indirect tax like excise duty, service tax, sales tax, custom duty etc., and if yes the registration number is to be provided. How can the auditor be in the position to verify whether provisions of various indirect laws are applicable to an assessee whose accounts are audited u/s 44AB of the Income Tax Act.
7. Clause 21(a) now requires the information to be given with regard to amounts debited to Profit and Loss Account, being in the nature of capital, personal and advertisement expenditure. As far as advertisement expenditure is

concerned, the details should be pertaining only for that expenditure which is not allowable as per the provisions of the Income Tax Act, 1961.

4.0 Impact of the above changes on Chartered Accountants

4.1 Looking to the above changes, the responsibility of the Auditor is much more onerous now. In fact, signing the tax audit report would mean that he is certifying that adequate tax has been deducted at source and deposited in time on ALL payments on which TDS is applicable. The Auditor and his staff cannot be expected to check each and every transaction, particularly where the volume of transactions is very large.

4.2 Going a step further, what about transactions not entered in the books of account, willingly or otherwise, on which TDS is applicable. **The fact remains that we are 'watch dogs and not blood hounds.**

4.3 It would have been reasonable to fix a threshold limit, say Rs. 50,000/- or Rs. 1,00,000/- and the Auditor could be asked to certify that TDS provisions in respect of payments exceeding the prescribed limit have been duly complied with.

4.4 This action of the Department is arbitrary, highly unreasonable and patently unjust. The proposed changes relating to the provision of TDS/TCS echoes and unfair and unjust attitude of the Department since what is intended is shifting of the responsibility of the Assessing Officer on to the Professionals. The Revenue Department cannot run away from the responsibility cast upon them and at the last moment shoulder the entire responsibility on the professionals or the assessees.

4.5 This conduct of the Department would cause extreme hardship, irreparable loss, prejudice, distress and harassment to the professionals.

4.6 This is not the first occasion when changes are made at the eleventh hour, making life difficult for the assessee, Chartered Accountants and tax consultants.

4.7 Further, this change in the requirement would impose additional responsibility on those clients who were punctual and have already filed their tax audit report before 25th July, 2014 using the old utility. Would that mean those assessees need to re-file their tax audit report? Would it mean that the responsibility of the department is now being cast on the professionals? The answers seem to have been lost in the dark.

5.0 Other Issues

5.1 Apart from the aforesaid issues, there are several burning issues which continuously haunt the tax payers and the Professional community.

5.2 The format/schema for e-filing of the income tax returns is also not provided in time. There are several issues relating to processing of returns at CPC, Bengaluru which remain unsolved. Several representations have been made, which have fallen on deaf ears.

5.3 All put together, the powers conferred in Section 119 of the Income Tax Act, 1961 are meant for specific purpose of proper administration of law, efficient management of work of assessment and collection of revenue and to relax procedures in law to avoid genuine hardship, whereas, the changes made in the procedure are more rigorous, harsh and caused extreme hardship, agony and distress to assessees as well as the tax professionals.

5.4 The typical bureaucratic approach of the CBDT and the Revenue Department is not only violative of good conscience and equity but also infringing and abridging the legal and fundamental rights of public at large. It has always been a practice of the CBDT to impose compliance part without a proper application of mind and that too at the very last moment.

5.5 Further, India being a vast country characterized by features like illiteracy, unavailability of power supply, poor internet connectivity as well as coverage, the suggestions roped in by the CBDT altogether fail at the grass root level.

5.6 Thus it is a matter of great concern not only for the Professional but also for the public at large and therefore; immediate interference of CBDT is warranted.

6.0 SUGGESTIONS

6.1 Being aggrieved by the arbitrary, unreasonable, excessive, colorable action of the CBDT, it is hereby suggested to delete the aforesaid changes relating to TDS and keep the same to an extent that is practicable for the assessees as well as the Chartered Accountants.

6.2 As regards the other changes, it is suggested to postpone the changes for a year so as to give enough time for understanding the requirements demanded for.

Thanking you,

Yours truly,

CA. Rajni Shah	**Shailesh C. Shah**
Chairman	**President**
Legal and Representation Committee – Direct Taxes	C.A. Association, Ahmedabad

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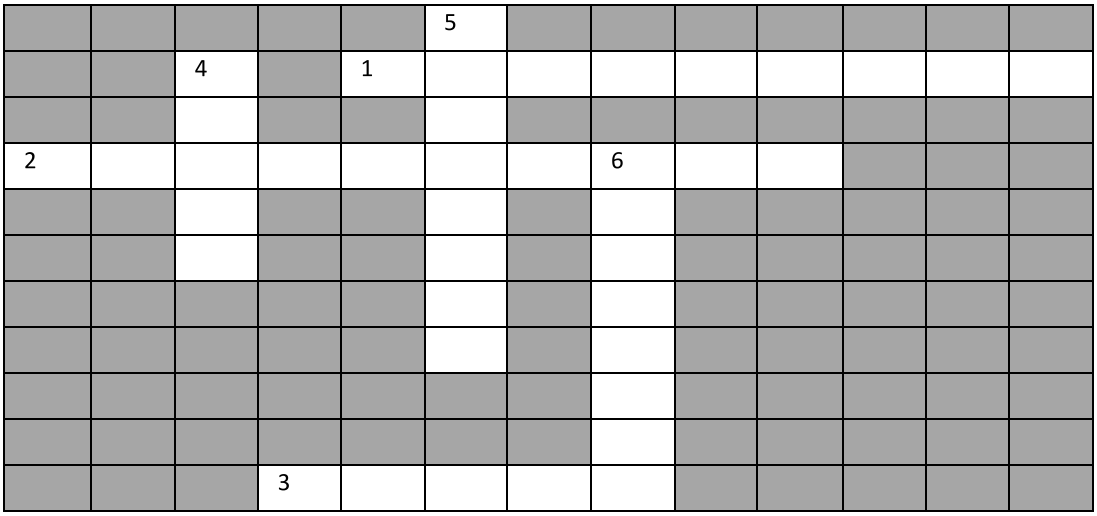
ACAJ Crossword Contest # 4

Across

1. In case of construction services, completion certificate is to be obtained from _____ Authority.
2. Post SFCP tax payer can freely _____ his overseas wealth into USA and enjoy the liquidity in USA.
3. Delay in filing return can result in _____ years of imprisonment.

Down

4. Be _____ is the goal of our life.
5. Success is a fight between you and _____.
6. According to Section 66E(b) of the Finance Act, 1994 the term "Construction" includes, not only new construction but _____, alteration, replacement or remodeling of any existing structure also.



Notes:

1. The Crossword puzzle is based on previous issue of ACA Journal.
2. Three lucky winners on the basis of a draw will be awarded prizes.
3. The contest is open only for the members of Chartered Accountants Association and no member is allowed to submit more than one entry.
4. Members may submit their reply either physically at the office of the Association or by email at caaahmedabad@gmail.com on or before 31/08/2014.
5. The decision of Journal Committee shall be final and binding.

Winners of ACAJ Crossword Contest # 3
1. CA. C. H. Pamnani
2. CA. Hardik Vora
3. CA. Hitesh Mandani

ACAJ Crossword Contest # 3 - Solution

Across

1.	Works Contract	2.	Place
3.	Employees	4.	YearToYear

Down

5.	StockOption	6.	Three
7.	Facebook	8.	MetroMan

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